

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



**75-5006**

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

IN THE MATTER  
of  
AMERICAN EXPRESS WAREHOUSING, LTD.,  
*Debtor.*

**JOINT APPENDIX**

CADWALADER, WICKERSHAM & TAFT  
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American Express Warehousing, Ltd.,  
*Debtor*  
One Wall Street  
New York, New York 10005

*Of Counsel,*

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JOHN J. WALSH

DUNNINGTON, BARTHOLOW & MILLER  
*Attorneys for Appellees*  
Dunnington, Bartholow & Miller and  
Scarburgh Company, Inc.  
161 East 42nd Street  
New York, New York 10017

*Of Counsel,*

CHARLES L. STEWART  
RICHARD E. RIEDER  
RIGDON H. BOYKIN



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## **JOINT APPENDIX**

### **Relevant Docket Entries**

AMERICAN EXPRESS WAREHOUSING INC.

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
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\* \* \*

3/8/74 (904) Filed Petition of the Official Creditors Committee of the debtor for a first and final allowance for services rendered from 1/28/64 to Date and for reimbursement for out-of-pocket disbursements, Dated: 3/7/74, and affidavit of Louis J. Testagrossa and Notice of hearing on petition for allowance for: (3/28/74 at 10:00 A.M. Room 601.)—forward.

3/22/74 (905) Filed substitution of attorneys for Scarburgh Company, Inc. Dunnington, Bartholow and Miller, 161 East 42nd St. NYC 10017, signed by: Judge Ryan, Dated: 3/22/74. forward.

3/26/74 (906) Filed memorandum of Scarburgh Company, Inc.; in opposition to the petition of the members and secretary of the official creditors committee for an allowance for their fees herein. sub. by: Dunnington, Bartholow and Miller, attorneys for claimant. forward.

*Relevant Docket Entries*

<i>Paper</i> <i>Date</i> <i>No.</i>	<i>Proceedings</i>
3/26/74 (907)	Filed Affidavit in opposition to petition for allowances, affidavit of Richard E. Rieder, re: Scarburgh, (reimbursement of fees) sworn to: 3/25/74. forward.
4/2/74 (908)	Filed Order allowing fees and disbursements of Cadwalader, Wickersham and Taft, Attorneys for American Express Warehousing, Ltd. Judge Ryan, Dated: 4/2/74.
4/2/74 (909)	Filed Order allowing fees and disbursements of Hannoch, Weisman, Stern & Besser, sub. by: Cadwalader, Wickersham and Taft, attorneys for American Express Warehousing, Ltd. Judge Ryan, Dated: 4/2/74.
4/2/74 (910)	Order allowing Priority Claim in the sum of \$1,277.64 be made to Am. Exp. Warehousing, Ltd. etc. Judge Ryan, Dated: 4/2/74. (by: attorneys for Debtor).
4/2/74 (911)	Filed Order directing the reinvestment of certain of Limited's funds now held by Chemical Bank and Sterling National Bank and Trust Co. of New York etc. Judge Ryan, Dated: 4/2/74 (filed by attorneys for debtor).
4/5/74 (912)	Filed Notice of Entry of Paper No. 908, 909 and 910.
4/25/74 (913)	Filed transcript of testimony before Hon. Sylvester J. Ryan, Dated: 3/28/74.

*Relevant Docket Entries*

<i>Paper Date</i>	<i>No. Proceedings</i>
5/15/74 (914)	Filed Order re: reinvestment of certain of Limited's funds now held by Chemical Bank and Sterling National Bank and Trust Company of New York pursuant to prior orders of this Court, etc. Hon. Roy Babitt, Bankruptcy Judge, Dated: 5/15/74.
5/29/74 (915)	Filed Order and Affidavit of John J. Walsh with respect to the payment as Priority Claims of certain allowances to counsel granted by prior orders of this court and a certain allowance to Limited for disbursements for administration expenses granted by a prior order of this Court, etc. signed by: Judge Ryan, Dated: 5/29/74.
5/29/74 (915)	Filed Order and Affidavit of John J. Walsh, authorizing and directing the distributions and the payment therein referred to, etc. signed by: Judge Ryan, Dated: 5/29/74.
6/7/74 (917)	Filed Memorandum Opinion No. 40787 re: Official Creditors' Committee petition for an allowance for its services and disbursements from 1/28/64 to date etc. <i>To recapitulate:</i> application for reimbursement & payment of additional fees totalling \$692,087.28, denied, for reimbursement of legal fees and disbursements in the sum

*Relevant Docket Entries*

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
		of \$77,307.30, denied-firm of Arthur Andersen and Co. in sum of \$45,218.96, denied, . . . It is ordered that any applications be made by Order to Show Cause with proof of service on all creditors (in re Casco Fashions, Inc. supra); and that a copy of this decision be served on all creditors and interested parties, who have appeared in this proceeding. Settle an order to this effect. Judge Ryan, Dated: 6/6/74.
6/19/74		Filed Corrected Page 10 of Memorandum Opinion (Above) Judge Ryan. Dated: 6/19/74.
6/7/74 (918)		Filed Supplemental Affidavit of David Hartfield, Jr. chairman of the Official Creditors Committee of the debtor and submitted in supplement to affidavit sworn to: 3/7/74, etc. sworn to: 3/27/74.
6/7/74 (919)		Filed Letter of March 22, 1974 of A. E. Staley Mfg. Co. in opposition to the petition of the Official Creditors Committee for an allowance out of the assets of the above estate for legal services, etc., by: Jay T. Holmes, Director Law Div.
6/18/74 (920)		Filed Order (upon application of American Exp. Warehousing, Ltd. for an order directing the reinvestment of certain of

*Relevant Docket Entries*

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
		Limited's funds now held by Chemical Bank and Sterling National Bank and Trust Co. etc.), Judge Ryan Dated: 6/18/74.
6/28/74	(921)	Filed Notice of Settlement and Order for a first and final allowances for fees of its members in the amt. of \$692,353.65 and disbursements in the amt. of \$32,938.51 etc. Judge Ryan, Dated: 6/28/74. (See Order For Full Details.)
7/18/74	(922)	Filed Order directing the reinvestment of certain of Limited's funds now held by Chemical Bank and Sterling National Bank and Trust Co. of N. Y. etc. Judge Ryan, Dated: 7/18/74.
8/21/74	(923)	Filed Order (re: affidavit of John J. Walsh) of final distribution sheet, etc. and that Sterling Nat'l. Bank and Trust Co. of N. Y. is authorized to transfer proceeds, etc. Judge Ryan, Dated: 8/21/74.
8/23/74	(924)	Filed Memo-Endorsed (on back of unsigned Order to Show Cause) . . . . This application for the within Order to show cause is denied; See Reporter's minutes of hearing this day held. So ordered. Judge Ryan, Dated: 8/23/74.
8/30/74	(925)	Filed Notice of Appeal of Dunnington, Eartholow and Miller from the order of

## Relevant Docket Entries

Paper	Date	No	Proceedings
			Hon. S. Carter J. Ryan denying their application for an OSC, entered on the 23rd day of Aug. 1974 and that Seaburgh Co. appeals to the USCA 2nd Cir. from order of Judge Ryan authorizing the final distribution for the Amexco Distribution Fund, entered on: 8/21/74. Dated: 8/23/74. (5) Notices Mailed.
	10/1/74	(926)	Filed transcript of testimony before Judge Ryan, Dated: 8/23/74.
	10/4/74	(927)	Filed stipulation that certain documents listed therein be made part of & transmitted to USCA in the record on appeal.
	10/15/74	(928)	Filed stipulation that the attached copy of a memorandum be transmitted to USCA as part of the record on appeal.
	10/15/74	(929)	Filed Notice that record on appeal has been Certified and transmitted to the USCA for the 2nd Circuit.
	10/16/74	(930)	Filed Notice that record on appeal has been certified and transmitted to the USCA for the 2nd Circuit.
	11/18/74	(931)	Received True Copy of USCA Judgment and Order affirmed with costs to be taxed against the appellants, Dunnington, Bar-

*Relevant Docket Entries*

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
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tholow and Miller and Scarburgh Co., Inc. A. Daniel Fusaro, Clerk. Judgment Entered—11/26/74 ————— Raymond F. Burghardt, Clerk. (no bill of costs or statement attached) Notices Mailed To: Official Creditors Committee, Messrs. Hartfield Garrison/Liman Haberkerr/Jerome Pierce/Powell Daly/Keane Marks— American Express Warehousing, Ltd. One Chase Manhattan Plaza, New York, N. Y. 10005, Dunnington, Bartholow and Miller attorneys for appellants, (Scarburgh Co. Inc.) 161 East 42nd Street, New York, N. Y. 10017 and Cadwalader, Wickersham and Taft, attorneys for Debtor, One Wall Street, New York, N. Y. 10005.

*Docketed as a Judgment No. 75,030 on January 8th, 1975.*

1/24/75 (932) Filed Order authorizing and directing the distributions etc. set forth in annexed Supplemental Distribution Sheet and Sterling National Bank and Trust Co. of N. Y. (designated depository). Judge Ryan, Dated: 1/24/75.

1/31/75 (933) Filed Order to Show Cause why an order should not be made granting an allowance of \$39,544.00 to Dunnington Bartholow and Miller as compensation for service etc. (re: application and affidavit

*Relevant Docket Entries*

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
		of Richard E. Rueder of the firm/Dunnington Bartholow and Miller) signed by: Judge Ryan, Dated: 1/24/75. Ret: <i>February 10th, 1975 at 10:30 AM in Room No. 2203. f.</i> Copy To
2/6/75 (934)		Filed Notice of change of address of LeBoeuf, Lamb, Leiby and MacRae to: 140 Broadway, New York, N. Y. 10005 Tele: (212) 269-1100, and affidavit of Stuart Lansky sworn to: 1/31/75. Copy to Judge Ryan and Attys. for Debtor.
2/7/75 (935)		Filed Affidavit in opposition to application of Dunnington Bartholow and Miller for an allowance sub. by: Jacqueline A. Swords from the firm: Cadwalader Wickersham and Taft, attorneys for debtor. sworn to: 2/5/75. f. Copy To
3/27/75		Filed Memo-Endorsed (on back of OSC) Dated: 1/31/75 and <i>Paper No. 933 . . .</i> re: application for allowance of \$39,544.00 etc. . . . Application is granted; so ordered. Judge Ryan, Dated 3/26/75.
4/1/75 (936)		Filed Notice of Entry of endorsement and order dated: 3/26/75. sub. by: Dunnington Bartholow and Miller, attys for Seaburgh Co. Inc. Dated: 3/31/75.
4/23/75 (937)		Filed Notice of Appeal to the U. S. Court of Appeals for the Second Circuit from

*Relevant Docket Entries*

<i>Date</i>	<i>Paper No.</i>	<i>Proceedings</i>
		the order of the U. S. District Court Judge S. J. Ryan, entered in this proceeding on March 26, 1975, Awarding an allowance of Atty's fees to Dunnington, Bartholow & Miller. Dated April 23, 1975, Mailed Notices.
4/29/75	(938)	Filed transcript of testimony before Judge Ryan, Dated: 2/10/75.
5/13/75	(939)	Filed Stipulation, . . . copy of which is annexed being missing from the files of the Clerk of the District Court, shall be transmitted to the U. S. Court of Appeals for the Second Circuit as part of the record on appeal in this matter. Sub. by: Cadwalader, Wickersham & Taft, Appellant Dated May 12th, 1975.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
In the Matter : In Proceedings  
of : for an Arrange-  
ment  
AMERICAN EXPRESS WAREHOUSING, LTD., : No. 63-B-1021  
Debtor. : NOTICE OF HEAR-  
: ING ON PETITION  
: FOR ALLOWANCE  
----- x

S I R S :

PLEASE TAKE NOTICE that the annexed petition will be presented to this Court at Room 601\*, United States Court House, Foley Square, New York City, on March 26, 1974 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, New York  
March 8, 1974

Yours, etc.,

OFFICIAL CREDITORS COMMITTEE  
AMERICAN EXPRESS WAREHOUSING,  
LTD.  
Office and P. O. Address  
One Chase Manhattan Plaza  
New York, New York 10005  
Tel.: 943-6955

## TO:

The Attorneys and Parties Listed  
on Exhibit A hereto.

\* Room 601 is the Clerks office. A notice will be  
posted on the door thereof on the return day indicating  
the assigned Courtroom.

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EXHIBIT A TO NOTICE OF HEARING ON PETITION  
FOR ALLOWANCE

Omitted as unnecessary.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, LTD., : No. 63-E-1021  
Debtor. :  
-----x

PETITION OF THE OFFICIAL CREDITORS  
COMMITTEE OF THE DEBTOR FOR A FIRST  
AND FINAL ALLOWANCE FOR SERVICES  
RENDERED FROM JANUARY 28, 1964 TO  
DATE AND FOR REIMBURSEMENT FOR OUT-  
OF-POCKET DISBURSEMENTS

TO: HONORABLE SYLVESTER J. RYAN  
JUDGE OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Petitioners respectfully represent:

1. On January 28, 1964, at the first meeting  
of creditors of American Express Warehousing, Ltd., the  
Debtor herein ("Limited"), petitioners were elected as the  
Official Creditors Committee of Limited and have been act-  
ing as such since that date.

2. On May 10, 1967 this Court made an order  
confirming Limited's Plan of Arrangement (the "Plan"), and  
on June 13, 1967 that order became final and not subject to

further review. Thereupon, Limited, as provided in the Plan, fixed June 14, 1967 as the Consummation Date. It gave the requisite notice to that effect; on June 14, 1967 initial distributions were made to Limited's creditors, and, as provided in the Plan, such distributions have been made from time to time thereafter.

3. The services rendered by petitioners from January 28, 1964 to date and their out-of-pocket disbursements for which an allowance is now sought, are set forth in detail in the affidavits of David Hartfield, Jr. sworn to January 19, 1974, Hamilton G. Kenner and Murray H. Warschauer, sworn to December 26, 1973 and December 31, 1973, which are annexed hereto.

4. (a) Petitioners have not entered into any agreement, written or oral, expressed or implied, with the Debtor or any other party in interest, or any attorney of such persons, for the purpose of fixing the amount of any of the fees or other compensation to be allowed out of or paid from the assets of the Debtor.

(b) The fees herein applied for will be distributed as described in the affidavit of David Hartfield, Jr., sworn to January 19, 1974 and annexed hereto and no agreement or understanding exists other than as therein described by petitioners.

(c) No agreement prohibited by U.S.C. Title 18 § 155 has been made.

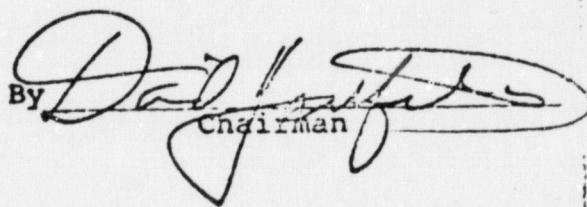
(d) Petitioners have no claim against or stock of the Debtor, nor has any beneficial interest, direct or indirect, in any such claims or stock, been acquired or transferred by petitioners or for the account of petitioners.

WHEREFORE, petitioners pray that an Order be made herein:

Granting to petitioners an allowance on account for services rendered by them herein and their out-of-pocket disbursements from January 28, 1964 to date in the amounts set forth in the annexed affidavits or, in such other amounts as this Court may deem proper.

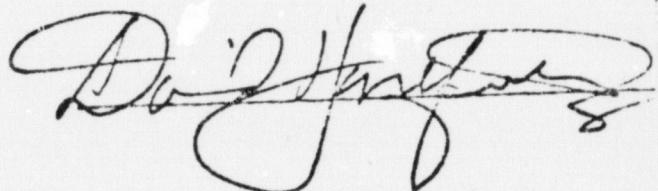
Dated: New York, New York  
March 7, 1974

OFFICIAL CREDITORS COMMITTEE

By   
Chairman

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID HARTFIELD, JR., being duly sworn, deposes and says: that he is Chairman of the Official Creditors Committee of American Express Warehousing, Ltd.; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein alleged on information and belief and that as to those matters he believes them to be true.



Sworn to before me this  
7th day of March, 1974

Augusta Seaman  
Notary Public

AUGUSTA SEAMAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 24-8835525  
Qualified in Kings County  
Certificate Filed in New York County  
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter  
of  
AMERICAN EXPRESS WAREHOUSING, LTD.  
Debtor.

In Proceedings for  
a.. Arrangement  
No. 63-B-1021

AFFIDAVIT

STATE OF NEW YORK )  
                      ) ss:  
COUNTY OF NEW YORK)

HAMILTON G. KENNER and MURRAY H. WARSCHAUER, each being  
duly sworn, depose and say:

1. Deponents (collectively, the "Secretary"), members  
of the New York bar, submit this affidavit in support of the  
application by the Official Creditors Committee ("Creditors  
Committee") of the above-named debtor, American Express  
Warehousing, Ltd. ("Limited"), seeking, among other things,  
approval of the payment of \$50,000 to deponents for their  
services as Secretary and Acting Secretary, respectively,  
of the Creditors Committee from January 28, 1964 to date.

2. Because of the large scope and complicated nature  
of the many claims, parties and problems involved in these  
proceedings, as described in the said application by the  
Creditors Committee, there were an extremely large number  
of creditors and other parties with whom continual contact  
had to be made, and who had to be constantly informed and

advised of developments, by the Secretary. In addition, as outlined below, a vast number of activities had to be performed by the Secretary in carrying out the duties required by that position.

3. The following is a general description of the services rendered by the Secretary during the period covered:

A. Correspondence, notices and memoranda to numerous parties covering the following matters, among others:

1. Requests for making the files of Limited and American Express Company ("Amexco") available for the Creditors Committee's inspection.
2. Requests for information concerning the insurance coverages of Limited and Amexco.
3. Requests for answers to questionnaires relating to the amounts and nature of claims against Limited and Amexco.
4. Requests for Statements of Compromise Loss and Group Compromise Loss.
5. Requests for Conditional Amendments of Proofs of Claim.
6. Notices of Creditors Meetings.
7. Notices of Creditors Committee Meetings.
8. The Amexco Proposal and Supplementary Proposal of April 9, 1964.

9. Solicitation of comments concerning the Amexco Proposal and Supplementary Proposal of April 9, 1964.
10. Extensions of time for acceptance of Amexco Proposal and Supplementary Pronosal of April 9, 1964.
11. Creditors Committee Report of July 10, 1964.
12. Extension of statute of limitations with respect to suits against Amexco.
13. Status of settlement negotiations with Amexco.
14. Insurance matters (Limited and Stake).
15. Examination of transcripts of creditors by Limited's insurers.
16. Amexco Proposal and Supplementary Proposal of June 21, 1965.
17. Agreement Among Creditors of June 18, 1965.
18. Escrow Agent/Disbursing Agent.
19. Allied Crude Vegetable Oil Refining Corporation ("Allied")/Ira Haupt & Co. ("Haupt") Settlements.
20. Assignments to Limited of any right to Custodial Receiver (Feder) Fund.
21. Indemnity Fund.

B. Correspondence, notices and memoranda to and from the Creditors Committee covering the following matters, among others:

1. Creditors' inquiries.
2. Information concerning filed claims.
3. Amounts claimed, signed acceptances, etc.
4. Proposed letters, memoranda and notices to third parties.
5. Memoranda of Creditors Meetings.
6. Memoranda of Creditors Committee Meetings.
7. Notices of Meetings.

C. Preparation and compilation of the following schedules, among others:

1. Lists of creditors answering questionnaires.
2. Lists of parties accepting the Amexco Proposal, etc.
3. Lists of Compromise Loss and Group Compromise Loss.

D. Preparation of the following documents, among others:

1. Final Proposal to Amexco and Revised Proposal to Amexco (six versions).
2. Statements of Compromise Loss and Group Compromise Loss.
3. Other forms required by the Escrow Agent/Disbursing Agent.

E. Receipt and review of the following information and documents, among others, requested by the Creditors Committee:

1. June 17, 1965 questionnaire (all creditors).
2. Compromise Loss Statement and Group Compromise Loss Statements (all creditors).
3. Amexco Settlement Documents.
4. Allied/Haupt Settlements Documents.

F. Attendance at various meetings and closings, among others:

1. Meetings of creditors.
2. Meetings of the Creditors Committee (115 meetings).
3. Meetings with Counsel for the Escrow/Disbursing Agent.
4. Meetings with Counsel for Amexco.
5. Meetings with Counsel for Limited.
6. Allied/Haupt Settlements Closing.
7. Amexco Consummation Date Closing.

G. Miscellaneous matters:

1. Opening and maintaining of Creditors Committee bank account.
2. Receipt of bills and payment of expenses.
3. Acting as holder of various documents delivered in escrow.
4. Maintenance of Creditors Committee files.

4. Illustrative of some of the detailed nature of some of the services generally described above are the following two examples:

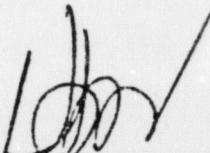
A. Allied/Haupt Settlements - On July 28, 1966 notices and memoranda with respect to the Allied/Haupt settlements, which had been prepared by the Secretary, were given to all acceptors of the Amexco Proposal. The notices and memoranda summarized the settlements and enclosed one or more copies of the various documents, more than 11 in number, relating to the settlements. Between July 28, 1966 and September 27, 1966, the date of the closing of the settlements, in addition to sending numerous letters to creditors, speaking to creditors and others on the telephone, sending letters to counsel for Amexco and counsel for the Escrow Agent/Disbursing Agent, the Secretary received and reviewed more than 444 copies of at least 7 different documents and agreements that were signed by more than 90 persons and firms. After the closing of the settlements on September 30, 1966, the Secretary arranged for the distribution of the various signed documents to the many signatories.

B. Indemnity Account - Under the provisions of the Amexco Proposal, of the approximately \$5.6 million payable by Amexco in June, 1973, an amount of approximately \$4 million had to be paid into the Indemnity Account. This amount could not be made available for distribution to the creditors until

the disposition of certain claims by the parties that either did not accept the Proposal or who may have been entitled to certain claims for reimbursement (i.e., Procter & Gamble, Lawrence Warehouse Company and Lawrence American Field Warehousing Corporation). Beginning in May, 1973, through August, 1973, the Secretary was involved with many aspects of the matter, including notices to creditors, communications, meetings and correspondence with counsel for the various parties and with the Escrow Agent/Disbursing Agent, arranging for the investment of the funds in the Indemnity Account from time to time pending their final distribution, review of files, preparation of memoranda, and arranging for the institution of the requisite proceedings to obtain the determination of the Arbitrator permitting the release of the funds from the Indemnity Account for distribution to the creditors.

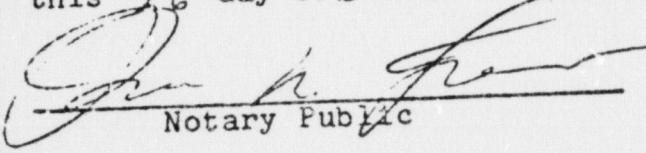
5. It is respectfully submitted that since the inception of the Creditors Committee in January, 1964, and for the following ten years, the Secretary has diligently

performed all of the duties called for by that office and  
that the reasonable value of the services of the Secretary  
is \$50,000.

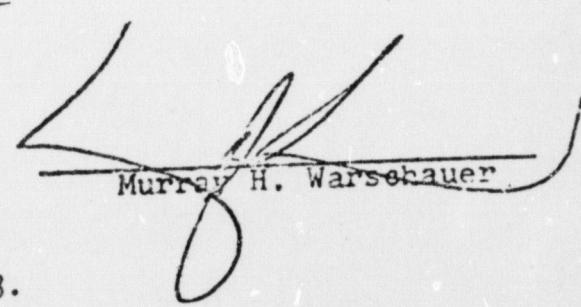


Hamilton G. Kenner

Sworn to before me  
this 26 day of December, 1973.

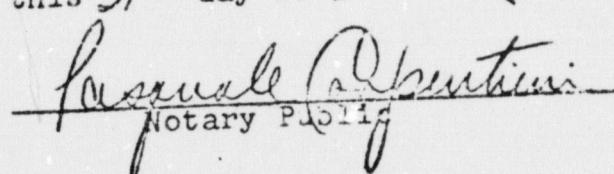


Notary Public



Murray H. Warschauer

Sworn to before me  
this 31<sup>st</sup> day of December, 1973.



Notary Public

PASQUALE CARPENTIERI  
Notary Public, State of New York  
No. 30-0377287  
Qualified in Nassau County  
Certificate filed in New York County  
Commission Expires March 30, 1975

## EXHIBIT B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

In the Matter :  
of : In Proceedings  
AMERICAN EXPRESS WAREHOUSING, LTD. : for an  
Debtor. : Arrangement  
Debtor. : No. 63-B-1021

----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID HARTFIELD, JR., being duly sworn, says:

1. I am a member of the Bar of this Court and  
the Chairman of the Official Creditors Committee ("OCC") of  
the debtor, American Express Warehousing Company, Ltd.

This affidavit is submitted on the instruction of the  
majority of the members of the OCC and is made in support  
of an application of the OCC for an allowance for its ser-  
vices and disbursements from the time of its organization  
on January 28, 1964 to date. This affidavit also supports  
on the instruction of the members of the OCC the applica-  
tion of the secretary and acting secretary (the "Secretary")  
of the OCC for their services and disbursements for the same  
period.

2. As hereinafter more fully discussed, when the OCC came into being the then projected time consuming and long term effort necessary to resolution of the multi-faceted problems impelled some interim method of providing compensation for the OCC members. Accordingly various of the creditors agreed to and have advanced funds for the compensation of the OCC members and in accordance with the then understanding those funds will be returned to each creditor who advanced funds from the allowance herein, pro rata to the amount advanced, subject only to the payment of currently unpaid bills of OCC members and its Secretary.

3. In order to avoid imposition on the Court and parties of instruments of unnecessary detail and length this affidavit will generally review the areas of service covered by the OCC. The extensive services of the Secretary are outlined in their accompanying affidavit. Each of the members of the OCC have the view that the application of the Secretary is modest in the light of those services.

4. Since all of the members of the OCC were lawyers, the OCC did not except in the case of Dewey, Ballantine, Bushby, Palmer & Wood retain a firm of New York lawyers to represent it but, except in a few instances, drew

upon the services of the firms to which the individual members belonged. The firms which provided such legal services were as follows:

<u>MEMBER OF OCC</u>	<u>LAW FIRM</u>
David Hartfield, Jr., (Chairman)	White & Case
Thomas Daly	Lord, Day & Lord
Lloyd K. Garrison	Paul, Weiss, Rifkind, Wharton & Garrison
Roy C. Haberkern, Jr.	Milbank, Tweed, Hadley & McCloy
Donald Marks	Baer & Marks
William Curtis Pierce	Sullivan & Cromwell
No Member - (Retained)	Dewey, Ballantine, Bushby, Palmer & Wood

#### I. BACKGROUND

5. Limited was a wholly owned subsidiary of American Express Company ("Amexco"), having a capitalization of approximately \$100,000. Limited came into existence on May 31, 1963 prior to which its predecessor, American Express Field Warehousing Corporation ("Field"), also a wholly owned subsidiary of Amexco, carried on a warehousing operation. Prior to May 31, 1963 Field, and thereafter Limited, operated a field warehouse in Bayonne, New Jersey, by arrangement with Allied Crude Vegetable Oil

Refining Corporation ("Allied"), in which vegetable oils and animal fats were stored in tanks leased to Allied by Bayonne Industries, Inc., and sub-leased by Allied to Field and Limited, respectively. When Limited succeeded Field as the operator of the warehouse facilities in Bayonne, it assumed all of the liabilities of Field on outstanding warehouse receipts.

6. The storage facilities at Bayonne consisted of a large number of storage tanks with inter-connected pipe lines and connected also with Allied's refining plant adjacent to the storage facilities.

7. Allied in its operations used cottonseed oil of various grades and classifications and soybean oil also of various grades. In addition, Allied used lard of various grades; and all of these commodities were at one time or another stored in the tanks in the custody of Field or Limited as the case may be.

8. Field and Limited issued their respective warehouse receipts for the commodities stored in the tanks in their custody and such receipts issued during the years 1962 and 1963 were involved in the proceedings hereinafter referred to.

9. During the years above mentioned, Field and Limited issued their warehouse receipts to suppliers of

commodities placed in the tanks above referred to, and in addition issued their receipts upon instructions of Allied to banks, brokers, commodity dealers and factors as security for loans made to Allied and as security for advances made by brokers for Allied's account.

10. On November 19, 1963 Allied filed a petition in bankruptcy in the United States District Court for the District of New Jersey, and shortly thereafter Allied was adjudicated bankrupt.

11. At the date of the filing of the petition in bankruptcy the holders of warehouse receipts issued by Field and Limited and then outstanding were unaware of the lack of sufficient oil in the tanks under the custody of Limited to cover the warehouse receipts.

12. Shortly after the filing of Allied's petition in bankruptcy holders of warehouse receipts and Limited determined by inspection of the tanks that there were huge shortages of oil and that many millions of dollars of face value of outstanding warehouse receipts had little of the respective commodities available to respond to their demands for delivery. Examination of the books of Allied indicated that much of the oil represented by validly issued warehouse receipts had been delivered out of the respective tanks upon forged delivery

orders. It was also developed that a large amount of warehouse receipts aggregating some \$39,000,000 in face value were forgeries.

13. Anthony De Angelis, president of Allied and other officers of Allied were indicted under federal indictments charging fraud, and De Angelis subsequently pleaded guilty and was sentenced to a prison term by the United States District Court for the District of New Jersey.

14. The extent of the fraud and the consequent losses involved in the Allied bankruptcy appear from the following figures:

Authorized receipts outstanding on November 19, 1963, per Limited's books	\$ 87,000,000
Releases of oil upon forged delivery orders	18,000,000
Forged warehouse receipts	<u>39,000.000</u>
Total -	<u>\$144,000,000</u>

15. The disclosures with respect to the warehouse conditions led to the filing by Limited of a petition in bankruptcy under Chapter XI in the United States District Court for the Southern District of New York. This petition was filed on December 30, 1963. United States District Court Judge Sylvester J. Ryan has supervised this proceeding and Limited has remained as a debtor in possession.

16. Following the discovery of the shortages of oil and on November 27, 1963 Amexco called a meeting of creditors of Limited and issued a statement that if Limited

"should be held legally liable for amounts in excess of its insurance coverage and other assets, American Express Company feels morally bound to do everything it can, consistent with its overall responsibilities, to see that such excess liabilities are satisfied."

17. Defendants were organized as an unofficial creditors' committee representing the different classes of warehouse receipt holders at the time of the meeting of November 27, 1963. In their unofficial capacity defendants entered into negotiations with counsel for Amexco to consider procedures for safeguarding the interests of creditors and the possibility of negotiating an arrangement that would permit the reorganization of Limited.

18. It was apparent to the unofficial creditors' committee that the creditors' interests would not be well served by efforts to secure satisfaction in the Allied bankruptcy proceedings in New Jersey. The unofficial creditors' committee therefore concentrated its attention upon the possibility of securing the cooperation of Amexco in providing funds for Limited which would salvage as much as possible of the losses sustained by the holders of warehouse receipts.

19. At a meeting held at the Chase Bank with the creditors and their lawyers, I outlined the grim prospects facing the creditor group and suggested to them that I and others would act as their Committee if appointed by the Court and if we could be assured of being paid for our services as Committee, as I foresaw quite accurately years of intensive, complicated Committee work. I pointed out that at that moment there was no way to make a fair assessment of charges for the Committee's work as many of the creditors were in different positions. For instance, some of them held both forged and non-forged warehouse receipts and some of them held only warehouse receipts which were not forged. Accordingly, I suggested that OCC bills be sent to the creditors based on the face value of receipts whether forged or unforqed and without regard to the amount of claimed loss on the receipts. It was this basis of billing which was adopted by the Committee. At that time I stated that we would do our best to straighten out the inequities of this method of billing at a later date. Hence, as indicated at page 24 below, some creditors have paid far more than others in relation to their respective recoveries. The fair way to deal with this problem at this time is for the OCC to reimburse each creditor, to the extent possible from the allowance sought herein by the OCC, the amount that creditor advanced toward

the Committee's fees and disbursements, after payment of the relatively small amounts not yet paid.

20. On January 23, 1964 the first meeting of creditors of Limited was convened at the United States District Court for the Southern District of New York.

Among other things the members of the unofficial creditors' committee were then elected as the OCC.

21. By the time the OCC was established some of the factual information relating to the bankruptcy of Allied and the extent of the losses occasioned by that bankruptcy had become known. It had not yet been determined, however, how Limited and its predecessor Field had conducted the warehousing operation or what the relationship was between the warehousing subsidiaries and Amexco, the parent corporation. Many of the creditors felt that the parent company should be held legally liable for the obligations of the subsidiary. Before a decision could be reached on this issue, it was necessary to make an extensive investigation of the factual background. Therefore the OCC initiated a study of the books and records of Amexco, Field and Limited. In order to undertake such an investigation the OCC organized a group of representatives of the law firms of which they were members and assigned to each of the members of this team an area of investigation and report.

22. At the outset the OCC concluded it would be unnecessary and wasteful to retain outside counsel since each of the members of the OCC had at his disposal the staff of his law firm and it was members of these staffs who were organized in the investigating team to dig out the facts and study the various legal problems which were presented as a result of this work.

23. The OCC decided at the outset that it did not and could not undertake to represent each of the many creditors in the relationship of attorney and client.

This position was made clear in announcements to the creditors at meetings which were called to discuss the problems which were to be dealt with by the OCC and to inform the creditors as to various developments.

24. Each of the members of the OCC agreed to distinguish between charges properly to be charged to the OCC and charges which would be incurred by their own clients. Each of the members of the OCC agreed to do his best to see to it that no charges were made to the OCC which were not appropriate OCC charges. In order to finance the work of the OCC it was decided that each of the firms of the members of the OCC should periodically bill the OCC for the services of the members of the OCC and the staffs of the respective firms rendered to OCC as dis-

tinguished from services rendered to clients of members of OCC. The creditors were requested as a group to contribute to the OCC on a pro-rata basis in order to defray the cost of these operations. A substantial number of creditors agreed to contribute on this basis, but some of the creditors did not do so. I am advised that the total amount contributed was \$807,980.34.\*

25. This application for allowances is designed to recover the aggregate amount charged to the OCC for services and disbursements to OCC in order that the contributing creditors may be reimbursed for the amounts so contributed. Other than the unpaid amounts hereinafter set forth on Exhibit B hereto nothing will be asked for or retained by the members of the OCC or their respective firms out of the allowance which is sought. I am advised that the total amount paid out to date is \$806,162.05.\*\*

## II. THE INITIAL FACTUAL INVESTIGATION BY THE OCC

26. When Field was succeeded by Limited on May 31, 1963, the warehousing business previously conducted

\* A list of the creditors who contributed and the amounts of their contributions is annexed hereto as Exhibit A.

\*\* The list of charges to the OCC for services and disbursements is annexed hereto as Exhibit B.

by Field (except for the Bayonne operation) was sold by Amexco to the Lawrence Warehousing Company and the name of Field was changed to Lawrence-American Warehousing Corporation, hereinafter referred to as "Lawrence-American". The headquarters of Lawrence-American were then removed by Lawrence Warehousing Corporation to San Francisco.

27. The investigation undertaken by the OCC involved the following problems:

(a) The liability, if any, of Amexco to holders of Field receipts and Limited receipts.

(b) The extent of the liability of Lawrence-American to holders of Field receipts.

(c) The extent of the liability, if any, of Limited to holders of Field receipts.

(d) The status of holders of forged receipts.

(e) The basis for computation of claims of holders of warehouse receipts; i.e., whether the amount shown on the face of the receipt representing the value of the oil at date of issuance, or the market value of the oil at the date of bankruptcy of Allied, or the market value of the oil at the date of bankruptcy of Limited.

(f) The rights, if any, of holders of forged receipts who had received such receipts in exchange for surrender of valid receipts.

(g) The status of creditors who had deposited oil in the field warehouse as compared to the status of holders of warehouse receipts who had taken them as security for loans or other types of advances.

(h) The liability of the insurers upon a series of policies issued at the instance of Field and Limited and Amexco.

(i) The liability of insurers upon a policy issued at the instance of Allied for the protection of those holding an insurable interest in oil stored in any of the warehouse facilities which included a group of tanks in the custody of Harbor Tank Storage Company adjacent to the tanks in the custody of Limited.

28. The investigation of the books and files of Limited and Amexco was accompanied by discovery proceedings against Lawrence-American, Despard & Co., Inc. and Allied in the bankruptcy proceedings in New Jersey. Testimony was obtained from various witnesses and in the course of the discovery proceedings various questions of law arose which were submitted to Judge Ryan for decision.

29. The discovery proceedings were very extensive and some 70,000 documents were copied, indexed and filed in a special room designated for the purpose on the 30th floor of the Courthouse by Judge Ryan where they filled approximately 10 filing cabinets and where they were available for inspection by all parties in interest.

30. The witnesses whose testimony was taken on oral deposition included Donald K. Miller, former president of Limited, Fred H. Turner, Limited's chief inspector, Thomas P. McLarney, Limited's warehouse custodian, and Michael G. Dellisola, a second warehouse custodian of Limited.

31. The discovery proceedings covered a period beginning in the spring and extending through the fall of 1964. The substance of the material collected as a result of the discovery proceedings was compiled in a book of 519 pages, plus exhibits (the "OCC Report"). The introduction to the OCC Report contained the following statement of the purposes for which it was prepared:

"The report....contains information which is thought to be useful in connection with consideration by creditors and their counsel of such questions as the responsibility of the debtor and Lawrence American Field Warehousing Corporation with respect to outstanding warehousing receipts, the liability of the parent company with respect to those receipts, the liability of the parent company on the theory that the subsidiary had only fictional existence, and the direct liability of the parent company by reason of its knowledge of the risks at Bayonne and the steps taken or not taken to protect the interests of those who dealt with the field warehousing subsidiary." (P.2)

32. During the period covered by the preparation of the OCC Report, the OCC engaged in discussions with counsel for Amexco which involved a number of complex and interrelated problems.

### III. THE FEDER RECEIVERSHIP

33. A substantial amount of residual material, generally referred to as "soap stock" was found in the Limited tanks following the bankruptcy petition.

34. On December 24, 1963 an action was commenced by Bayonne Industries, Inc., the owners of the tank farm, in the Chancery Court of New Jersey, against Limited and others demanding the appointment of a custodial receiver to take possession of the tanks.

35. On January 7, 1964 an order was entered in the Bayonne Industries action appointing Robert S. Feder as receiver to take possession of the tanks and their contents, to inventory the so-called "soap stock", to sell it and to hold the proceeds without prejudice to the legal rights of the parties interested in such contents.

36. Mr. Feder's actions produced an amount of approximately \$6,000,000 gross as the proceeds of sale of the "soap stock".

37. The OCC contested efforts on the part of the trustee in bankruptcy of Allied to secure possession of the proceeds of sale, and after a hearing on June 9, 1964 on an application by Limited to obtain an order directing that the proceeds of sale be held in the jurisdiction of this Court subject to the claims of the trustee in bankruptcy of Allied, a meeting was held among the representatives of the interested parties and the judges of the United States District Court for the District of New Jersey,

the Chancellor of the New Jersey Superior Court and Judge Ryan of the United States District Court for the Southern District of New York, at which it was agreed that the net proceeds of sale would be held by the Chapter XI Court in New York, subject to reclamation claims or other claims that might be made against said fund.

38. As a result of the foregoing proceedings in which the OCC participated, the sum of \$5,186,291.35 was turned over to the Chapter XI Court in New York pursuant to an order of Judge Ryan dated January 31, 1966, and, subject to reclamation claims, the proceeds were invested in negotiable certificates of deposit in New York.

#### IV. THE FIRST AMEMCO PROPOSAL

39. An order was entered in the Chapter XI proceeding by Judge Ryan fixing July 28, 1964 as the last date for filing of claims by Limited's creditors. By that date claims aggregating more than \$209,000,000 were filed. Claims in many instances over-lapped. Many of the banks which filed claims held receipts as collateral which had been delivered to them by brokers, dealers and commodity suppliers to whom the receipts had been delivered and who had re-hypothecated the receipts with the banks. Thus such receipts were the subject of duplicate claims.

40. At the outset counsel for Amexco took the position that Amexco would be interested in providing funds for a re-organization plan only if the plan should provide complete protection for Amexco. This condition required the OCC to consider how the claims of creditors could be classified so as to provide protection to Amexco against third party claims which might result from insurance recoveries or other third party sources of recovery by the creditors holding warehouse receipts.

41. The first plan proposed by counsel for Amexco offered a total of \$45,000,000 to be paid into Limited's estate, plus a guarantee of \$10,000,000 with respect to the insurance carried by Limited. It was stipulated that administration expenses in the re-organization proceeding should be charged against the fund.

42. The proposal was submitted by the OCC to the creditors and rejected.

43. Thereafter numerous meetings were held by the OCC with counsel for Amexco and discussions covered a multitude of problems arising out of the effort of the OCC to secure a substantial improvement in Amexco's offer.

#### V. THE AGREEMENT AMONG CREDITORS

44. It became apparent during the discussions among the creditors on the terms of the first Amexco pro-

posal that some basis had to be established to determine the division of the proceeds of settlement among the creditors before their approval could be obtained to a settlement agreement with Amexco. The OCC therefore entered into protracted negotiations with groups of creditors as a result of which the Agreement Among Creditors was prepared under date of June 18, 1965 as a basis for the acceptance of the final proposal of Amexco.

45. The Agreement Among Creditors established a "receipt commodity value" for the various kinds of oil covered by receipts. It also established priorities among the holders of receipts as between those having the sole interest in a receipt and those holding receipts by reason of re-hypothecation thereof. It established a definition of "compromise loss" as a basis for allowance of claims in the Chapter XI proceeding, and provided certain restrictions and limitations upon the computation of "compromise loss".

46. The Agreement Among Creditors also required each receipt claimant who should become an acceptor of the Amexco settlement proposal to deliver to a Disbursing Agent an itemized statement of his "compromise loss" with an indication of the interests of any claimants in the receipts out of which the claimants' rights arose.

47. The Agreement Among Creditors further provided for the reporting and crediting against receipt claims of amounts recovered on third party claims.

48. It was also provided in the Agreement Among Creditors that the distribution to the receipt claimants should be based upon the amount of the creditor's claim allowed in the Chapter XI proceeding; and it provided that no acceptor should contest the allowance of other acceptors' claims except on certain limited grounds.

49. The Agreement Among Creditors provided for distributions by the Disbursing Agent from a fund after final adjudication by the Chapter XI Court of the claims of accepting creditors.

50. Certain provisions were made in the Agreement Among Creditors for holding in a suspense account amounts which might be subject to recoupment by the Disbursing Agent, pending recoveries on third party claims.

51. Further provision was made for recomputation of amounts distributable to the accepting creditors as and when changes occurred in the amounts of the creditors' claims by reason of third party recoveries or otherwise.

52. In addition, certain adjustments were made in favor of those accepting creditors who had interests in the Field insurance as compared to those who had an interest in the Limited insurance.

53. The Agreement Among Creditors is a complex document of 31 pages. In drafting it the OCC had in contemplation a revised form of Amexco proposal which was subsequently accepted by all of the creditors (with one exception) after the Agreement Among Creditors had been similarly accepted.

#### VI. THE FINAL AMEXCO PROPOSAL

54. The revision of the Amexco Proposal was negotiated contemporaneously with the development and submission of the Agreement Among Creditors. It represented a substantial improvement in terms for the various groups of creditors.

55. The original figure of \$45,000,000 was increased to \$60,000,000, which total was broken down as follows:

(a) The sum of \$13,000,000 was to be paid into the Chapter XI Court over a period of six years as a fund to be distributed to all creditors of Limited.

(b) The sum of \$41,000,000 was to be paid to a Disbursing Agent over a period of six years to be distributed only to those creditors accepting the Amexco proposal.

(c) The sum of \$1,000,000 was to be paid to the Disbursing Agent for distribution only to the so-called Lawrence-American group of creditors.

(d) The sum of \$5,000,000 was to be paid to the holders of forged warehouse receipts.

56. There were various restrictions and conditions imposed with respect to the foregoing distributions which need not be elaborated upon at this point.

57. Amexco's main proposal dealt with the contributions specified in subparagraphs (a), (b) and (d) above. A supplemental proposal dealt with item (c) above. In addition to the foregoing the Amexco Proposal provided that accepting creditors should receive the proceeds of claims upon the insurance carried by Field and Limited, whether realized by litigation or settlement, up to a maximum of \$20,000,000. One hundred per cent of amounts in excess of \$20,000,000 and up to \$30,500,000 would be paid to Amexco, except the percentage would be 75% if more than \$2,000,000 of aggregate insurance recoveries be effected by settlement. Amexco would receive 50% of aggregate net insurance recoveries in excess of \$30,500,000.

58. The Amexco Proposal and Supplementary Proposal were embodied in separate documents extremely complex and detailed in their formulation. These proposals were submitted to the creditors in June 1965. The principal proposal required acceptance by 90% or more of the depositors' stated valuations of all authorized receipts. Other requirements were fixed in respect to the acceptances of holders of unauthorized receipts and acceptances by the Lawrence-American creditor group.

59. Meetings of the creditors were held at which members of the OCC answered inquiries with respect to the terms and conditions of the proposal. The OCC then circulated the creditors with respect to the Agreement Among Creditors and their acceptance of the Amexco Proposals.

60. By October 15, 1965 all of the creditors, except Procter & Gamble Distributing Corporation ("P & G"), had executed the Agreement Among Creditors and Amexco declared that requisite acceptance of its proposals had been achieved.

#### VII. THE STOCKHOLDERS' SUITS AGAINST AMEXCO

61. When the proposals of Amexco became known, suits were instituted against Amexco to restrain the proposed settlement on the ground that it would constitute a waste of corporate assets. These suits were consolidated and Amexco's proposal to the creditors was conditioned upon the entry of a judgment in such consolidated action which should dismiss the action on the merits. Hearings were held before Mr. Justice Jacob Markowitz in the Supreme Court, New York County, who appointed Hon. Charles S. Desmond as Referee to hear and report on certain issues. A Report was filed on February 6, 1967 approving the proposed settlement, and on May 5, 1967 a judgment dismissing the

action became final and not subject to further review. See, Heimann vs. American Express Co. 53 Misc. 2nd 749 (S.Ct. N.Y. Co. 1967).

#### VIII. THE TAX RULING

62. A second condition to the Amexco Propos-  
involved a favorable ruling by the Commissioner of Internal  
Revenue, permitting Amexco to use its payments pursuant to  
the settlement agreements as tax deductions. The OCC did  
not participate in this aspect of the matter, but such  
ruling was obtained, and on June 14, 1967 the proposed  
settlements were declared consummated by Amexco and the  
initial payments were made into the Chapter XI Court and to  
the Disbursing Agent.

#### IX. THE LAWRENCE-AMERICAN CHAPTER XI PROCEEDING

63. As a result of litigation against Lawrence-  
American by creditors holding warehouse receipts issued by  
Field, a Chapter XI proceeding was instituted by Lawrence-  
American on June 19, 1964 in the United States District  
Court for the Northern District of California, Southern  
Division. In the litigation against Lawrence-American by  
holders of Field receipts, Amexco had been impleaded as a  
third party defendant.

64. The indemnity provisions of the Amexco Proposal with respect to third party claims made it imperative to eliminate the potential liability of Amexco to Lawrence-American. The OCC negotiated with the creditors constituting the Lawrence-American group and Amexco to secure a settlement of the claims filed in the Chapter XI proceeding in California. The work of the OCC in this area resulted in the so-called supplementary proposal to the Lawrence-American creditors. This supplementary proposal was the basis for the additional \$1,000,000 offer of Amexco to this group which is referred to in paragraph 55(c) above.

X. THE ALLIED TRUSTEE'S NEW JERSEY PREFERENCE ACTIONS

65. In November 1965 the trustee in bankruptcy of Allied commenced a series of actions in New Jersey, New York and other jurisdictions against the holders of warehouse receipts claiming preferential payments by Allied to such receipt holders in an aggregate amount substantially in excess of \$100,000,000. It was apparent to the OCC that such suits threatened the consummation of the Amexco settlement since the creditors against whom such preference claims were made would in each case implead Amexco.

66. Negotiations were therefore undertaken between the OCC and the trustee in bankruptcy of Allied in an effort to dispose of this litigation.

67. The efforts of the OCC to settle the litigation commenced by the trustee in bankruptcy of Allied resulted in a proposal to pay the trustee from the out of Court funds that would be made available through the prospective settlement with Amexco the sum of \$500,000.

68. The proposed settlement with the Allied trustee was also conditioned upon the withdrawal of all claims against Amexco arising out of or in connection with the Allied bankruptcy.

69. An additional condition of the proposed settlement with the trustee in bankruptcy of Allied was that creditors who had filed receipt claims in the Allied bankruptcy court would subordinate those claims to the claims of Allied's trade creditors to the extent of 50% of their claims.

70. The conditions mentioned in the two immediately preceding paragraphs were complicated by the fact that one of the large receipt claimants in the Allied bankruptcy was the trustee in bankruptcy of Ira Haupt & Company, a brokerage firm which had carried a substantial account for Allied. The trustee in bankruptcy of Haupt refused to subordinate his claim in the Allied bankruptcy to the claims of trade creditors unless as a part of the settlement a claim which the trustee had filed against Limited and a claim which it had asserted against Amexco be settled at the same time.

71. The OCC then negotiated an arrangement with the trustee in bankruptcy of Haupt for the payment to said trustee by Amexco, from the out of court funds that would be made available through the prospective settlement with Amexco, and by some of the principal creditors in the Limited Chapter XI proceeding of an aggregate of \$2,500,000 in exchange for which the trustee in bankruptcy of Haupt was to discontinue its action against Amexco and to release the claims made therein, to withdraw its claim as a creditor of Limited, and to enter into the subordination agreement with the trustee in bankruptcy of Allied.

72. The limited partners of Ira Haupt & Company introduced objections to the application of the trustee in bankruptcy for an order approving the proposed settlement arrangements.

73. The representatives of the OCC participated in the negotiations for the settlement and in hearings before Referee Edward Ryan on the objections of the limited partners of Haupt.

74. Referee Ryan's approval of the settlement was sustained by the District Court on July 29, 1969 (In re Haupt, 304 F. Supp. 917). The closing of the settlement, in which the OCC actively participated, took place on September 27, 1966.

XI. THE ALLOWANCE OF CREDITORS' CLAIMS IN THE LIMITED  
CHAPTER XI PROCEEDING

75. At the outset of the Limited Chapter XI proceeding, the Court appointed Messrs. Cadwalader, Wickersham & Taft as attorneys for the debtor in possession.

76. The terms of the proposal of Amexco to the Limited creditors specified the kinds of objections that might be filed by the debtor to claims of creditors in the Chapter XI Court.

77. Within the limit of the specifications thus negotiated by the OCC, the attorneys for the debtor filed a general objection to all claims of warehouse receipt holders based upon the proposition that since the warehouse receipts referred to a fungible mass of liquid, and since the warehouse receipts all bore the qualifying phrase "and said to be or contain", the warehouse receipt holders were entitled only to the contents of the tanks as found after the date of bankruptcy, including the large amount of salt water found therein.

78. The OCC acting on behalf of all of the creditors filed a motion in the District Court on March 27, 1967 to strike this defense. The motion was argued on April 4, 1967, and on April 11, 1967 Judge Ryan handed down an opinion granting the motion and dismissing the defense.

79. The burden of this procedure and the preparation of the necessary papers, including memoranda of law and documentation, were all handled by the OCC.

### XII. THE INSURANCE CARRIED BY FIELD AND LIMITED

80. Both Field and Limited carried what is commonly referred to as warehousemen's insurance. The insurance in force in November 1963 consisted of a basic policy for a face amount of \$500,000/2,000,000, plus seven layers of excess coverage. Prior to May 31, 1963, when Field was the operating warehouseman, the insurance included the basic policy and five layers of excess coverage. The excess contracts were written by Lloyds of London and other English companies.

81. The insurance coverage had been procured by Amexco on behalf of their warehousing subsidiaries through Despard & Co., Inc. ("Despard").

82. The basic insurance and each layer of excess provided two types of coverage:

- (a) Warehouseman's legal liability,
- " "
- (b) Fidelity.

83. The complexity of the legal problems involved in the insurance coverage led to the appointment by Judge Ryan of the firm of Carter, Ledyard & Milburn as special

counsel to the debtor in possession to deal with the insurance claims. Messrs. Carter, Ledyard & Milburn, in turn, retained the firm of Kissam & Halpin as trial counsel to handle the insurance litigation.

84. The OCC, in cooperation with Richard D. McClung, Esq. of Carter, Ledyard & Milburn, and James H. Halpin, Esq., devoted considerable effort and time to an analysis of the legal and factual problems relating to the insurance claims. An extensive memorandum was prepared by members of the staffs of the firms to which the individual members of the OCC belonged, and a supplemental memorandum analyzing the policies and cover notes was furnished to Messrs. McClung and Halpin.

85. The insurers of the Field and Limited policies first gave notice that they elected to rescind the policies from their respective dates of inception and they tendered to the debtor in possession the amounts of the premiums paid on those policies. The checks covering the offered refund of premiums were returned by Mr. McClung with the concurrence of the OCC.

86. In June 1964 the debtor in possession, acting through special counsel, instituted nine actions in the United States District Court for the Southern District of

New York against the insurers seeking a judicial declarati:  
that the purported rescissions of the insurance contracts  
were ineffectual and that the insurers were bound by said  
contracts.

87. Extensive discovery proceedings were had  
in connection with the litigations, including depositions  
taken in England relevant to the claim of the insurers that  
misrepresentations had been made in the procurement of the  
policies.

88. The OCC actively participated in discussions  
and negotiations relating to the subsequent settlement of the  
insurance litigations, for \$8 million, as approved by Judge  
Ryan in his order of July 15, 1970.

### XIII. THE PROCTER & GAMBLE CLAIM

89. Procter & Gamble Distributing Company ("P & G")  
held warehouse receipts for soybean oil which it had de-  
posited in the tanks at Bayonne pursuant to a contract of  
sale of the oil to Allied.

90. Upon the deposit of the oil P&G received  
warehouse receipts issued by both Field and Limited.

91. When the final Proposal of Amexco was pre-  
sented to the holders of warehouse receipts, P & G refused  
to become an acceptor. It had in the meantime recovered a  
judgment in a suit against Lawrence-American based upon the  
receipts which it held and had thereafter brought suit and

recovered summary judgment against the insurers on a policy issued in favor of Allied by a group of American insurance companies.

92. Allied had procured this insurance policy (hereinafter referred to as WS-1) through Stake & Company, as brokers. The insurance policy had a face amount of \$45,000,000. It was issued in favor of Allied and in favor of a number of endorsees, including P & G.

93. The judgment obtained by P & G against the WS-1 insurers was upheld on appeal.

94. Since P & G was not an acceptor of the Amexco Proposal, it retained its rights as a creditor of Limited and filed a claim in the Chapter XI proceeding as such. Despite the collection of the amount of its judgment from the insurance companies, P & G asserted in the Chapter XI proceeding a claim for additional losses and damages consisting of its expenses in the litigation against Lawrence-American and the insurance companies, and it became necessary therefore as a condition to the consummation of the Amexco Proposal and the plan of reorganization of Limited that P & G's claim be disposed of.

95. The OCC therefore after extensive negotiations with P & G's counsel arranged a settlement of P & G's claims which was approved by Judge Ryan after a hearing upon notice to all interested parties.

96. An agreement was prepared by the OCC between P & G on the one hand, and the members of the OCC in their official capacity, and said agreement was approved by the Court.

XIV. RECLAMATION CLAIMS

97. The net proceeds of the sale of materials in the Field warehouse tanks in Limited's custody were received by the Chapter XI Court in February 1966. Under the instructions of the Court they were then invested in certificates of deposit and continued to be so invested pending final disposition thereof.

98. A hearing was held before Judge Ryan on July 27, 1967 upon claims of reclamation creditors asserting an interest in the proceeds of sale of the materials in Limited's tanks.

99. Prior thereto the OCC in conjunction with Limited's counsel, negotiated settlements with each of the claimants except Universal Automated Industries, Inc., as successor to Metropolitan Shortening Corporation, and Daniel F. De Lear, trustee in bankruptcy of Allied. The claimants with whom settlements were negotiated were:

Bankers Trust Company  
Norddeutsche Kreditbank Akt.  
Mees & Hope  
Swiss Credit Bank  
J. Henry Schroder Banking Corporation  
Bank Leumi le-Israel B.M.  
East Jersey Railroad and Terminal Company

100. The aggregate amount of the so-called Sludge Fund and interest earnings thereon which were the subject of the reclamation claims was \$5,601,200.95. The aggregate amount for which the reclamation claims were settled (with interest thereon) was \$449,426.35.

101. The Chapter XI Court entered an order dated August 2, 1967, directing that the sum of \$1,782,443.66, plus the interest earned thereon, be reserved pending the determination of the claims of the Allied trustee and Metropolitan.

102. An additional reserve was set aside by the Court by order dated August 25, 1967 to take care of possible tax claims.

103. After the payment of the agreed upon amounts to the reclamation creditors and the establishment of the reserves above referred to, a balance of \$2,840,536.75 remained for distribution to the holders of authorized receipts whose claims were allowed in the Chapter XI proceeding.

104. As a result of the activities and services rendered by the OCC, the reclamation claims of the Allied trustee subsequently were settled and additional amounts were made available for distribution to creditors.

XV. BAYONNE INDUSTRIES CLAIM FOR USE AND OCCUPATION

105. Bayonne Industries, Inc., as owner of the tanks leased to Allied and sub-leased to Limited, filed a claim in the Superior Court of New Jersey, Chancery Division, Hudson County, for \$455,699.93 for the use and occupation of the tanks after termination of the lease to Allied on December 5, 1963.

106. The OCC retained the firm of Lum Biunno & Tompkins of Newark, New Jersey, to litigate this claim.

107. The claim covered the period from December 5, 1963 to the date when each of the respective tanks was surrendered to Bayonne Industries, Inc. by the custodial receiver, Robert C. Feder.

108. Hearings were held before the Chancery Court and the claim was allowed in full. A number of questions of fact and law were briefed and litigated and the OCC engaged actively in the litigation in cooperation with its New Jersey counsel.

XVI. CONCLUSION

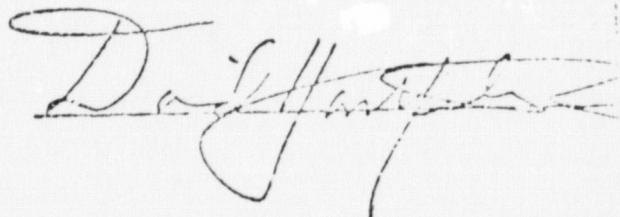
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109. While the foregoing recitals are but a broad outline of the scope of the issues, the number of creditors and amounts involved, the overall enormity of the problems and the efforts of the members of the OCC, those factors are well known to the Court which oversaw the proceedings through this now ten year period necessary to resolution.

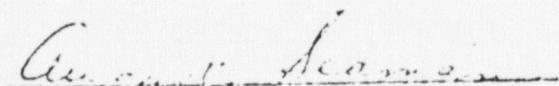
110. In summary, if the Court allows the application herein, the sum of \$41,656.37 will be paid to cover unpaid bills (Exhibit B) \$50,000 will be paid to the Secretary, and \$806,162.05 will be reimbursed to Creditors (Exhibit A.).

WHEREFORE, it is respectfully requested that the OCC be allowed the sum of \$897,818.42 for its services and disbursements herein.

Respectfully submitted,



Sworn to before me this  
7th day of March, 1974.



AUGUSTA SEAMAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 44-883572  
Qualified in Albany, NY  
Certificate Filed in Albany, NY  
Commission Expires March 3, 1974

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EXHIBIT A

AMERICAN EXPRESS WAREHOUSING LTD.

Amounts Paid to Official Creditors Committee

	Total Amount Paid	%
Bank of America	\$ 80,926.71	10.0
Bank Leumi le-Israel B.M.	5,564.82	.7
Bankers Trust Company	11,651.47	1.4
Bell Financial Corporation	39,702.53	4.9
Bunge Corporation	130,108.14	16.1
Cargill, Incorporated	10,584.28	1.3
The Chase Manhattan Bank	94,632.99	11.7
Continental Grain Company	39,420.83	4.9
Continental Illinois National Bank & Trust Company of Chicago	205,789.87	25.5
Garnac Grain Co.	3,519.74	.4
Harris Trust and Savings Bank	2,199.06	.3
Irving Trust Company	31,448.76	3.9
The Marine Midland Trust Company of N.Y.	13,552.66	1.7
Morgan Guaranty Trust Company of N.Y.	23,048.05	2.8

## EXHIBIT A - Page 2

National State Bank of Newark	8,804.83	1.1
National Dairy Products Corporation (Humko Products Div.)	5,102.33	.6
Pacific National Bank of San Francisco	14,467.48	1.8
M. Samuel & Co. Ltd.	9,358.57	1.2
Royal Meat Products	1,247.62	.2
Scarburgh Company	1,758.94	.2
J. Henry Schroder Banking Corp.	64,103.72	7.9
J. R. Williston & Beane, Inc.	<u>10,987.39</u>	<u>1.4</u>
Total	\$807,980.84	100.00

EXHIBIT BAmounts Paid by Official Creditors Committee

## 1. Legal Fees and Disbursements

Baer, Marks, Friedman &amp; Berliner

Fees:	\$56,268.00
Disbursements:	<u>421.35</u>
	\$ 56,689.35

Lord, Day &amp; Lord

Fees:	73,485.00
Disbursements:	<u>958.43</u>
	74,443.43

Milbank, Tweed, Hadley &amp; McCloy

Fees:	63,887.50
Disbursements:	<u>631.31</u>
	63,518.31

Paul, Weiss, Goldberg, Rifkind,  
Wharton & Garrison

Fees:	110,650.00
Disbursements:	<u>2,158.28</u>
	112,808.28

Sullivan &amp; Cromwell

Fees:	160,900.00
Disbursements:	<u>5,430.43</u>
	166,330.43

White &amp; Case

Fees:	175,000.00
Disbursements:	<u>1,906.93</u>
	176,906.93

J 62a

Q.

ABLE

ONLY CIVIL, CRIMINAL, AND  
ADMINISTRATIVE

## EXHIBIT B - Page 2

Dewey, Ballantine, Bushby,  
Palmer & Wood

Fees:	77,000.00
Disbursements:	<u>307.30</u>
	<u>77,307.30</u>
	\$728,004.50

2. Auditing Fees and Disbursements (Arthur Andersen & Company)	\$45,218.96
3. Chemical Analyst's Fees (Purvin & Gertz)	400.00
4. Printing	14,672.54
5. Clerical Help	5,654.26
6. Bar Association Reporting Service	76.65
7. Photocopying	9,036.98
8. Telegrams	1,237.21
9. Supplies, Postage and Miscellaneous	<u>1,860.87</u>
Total	<u><u>\$806,162.05</u></u>

SUMMARY

Amounts paid to OCC	\$807,930.84
Amounts paid by OCC	<u>806,162.05</u>
OCC bank balance	\$ 1,818.79

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## EXHIBIT B - Page 3

OFFICIAL CREDITORS COMMITTEE  
 American Express Warehousing, Ltd.  
 One Chase Manhattan Plaza  
 New York, N. Y. 10005

Listed below are the invoices which have been received, but not as yet paid, by the Committee covering legal fees and disbursements:

<u>Firm</u>	<u>Date of Invoice</u>	<u>Period Covered</u>	<u>Legal Fees</u>	<u>Disbursements</u>
White & Case	6/13/67	May thru June 13/67	\$5,300	\$ 20.00
White & Case	Unbilled	June 13/67 to date	19,500	
Baer, Marks, Friedman & Berliner	8/25/67	May thru June 12/67	1,550	18.90
Milbank, Tweed, Hadley & McCloy	11/6/67	May 1967	650	-
		June 1967	50	-
		July 1967	175	-
		Sept. 1967	150	-
	2/1/68	Nov. 1967	100	4.05
		Dec. 1967	200	
	12/12/68	Feb. 1968	150	
		March 1968	30	
		April 1968	120	
		May 1968	180	
		July 1968	60	

## EXHIBIT E, Page 4

Lord, Day & Lord	7/21/67	May 1967	1,545	160.47
	9/22/67	July 1967	120	47.55
		August 1967	180	1.15
	1/11/68	Sept. 1967	75	3.35
		Dec. 1967	240	
	7/16/68	Feb. thru May 1968	350	
	8/7/68	June 1968	300	
	10/4/68	July 1968	420	10.90
			\$41,390	\$266.37
	Total			

RECAPITULATION

\$ 50,000.00	Secretary
806,162.05	Paid
41,656.37	Unpaid
<u>\$557,618.42</u>	Total

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter :  
of : AFFIDAVIT IN  
AMERICAN EXPRESS WAREHOUSING, LTD., : OPPOSITION TO  
Debtor. : PETITION FOR  
ALLOWANCES

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

RICHARD E. RIEDER, being duly sworn, deposes and says:

1. I am a member of the firm of Dunnington, Bartholow & Miller, attorneys for the claimant, Scarburgh Company, Inc. ("Scarburgh"), in the above entitled action, and am familiar with the matters set forth herein. This affidavit is submitted in opposition to the petition of the Official Creditors' Committee ("OCC"), for an allowance for services rendered by them and by the Secretary of the Committee in this proceeding.

### Background

2. American Express Warehousing Company, Ltd. ("Limited"), a wholly owned subsidiary of American Express Company ("Amexco"), was engaged in warehousing oils and animal fats. In 1963, it operated a tank farm in Bayonne, New Jersey comprised of tanks leased to it by Allied Crude Vegetable Oil Refining Corporation ("Allied"). Allied operated a refining plant connected to Limited's tank farm.

3. Limited issued receipts to suppliers of commodities stored in its tanks and to dealers, brokers and financial institutions as security for loans made to Allied or for its account. Scarburgh was one such broker. It loaned a total of over \$25,000,000 to Allied. Many of such loans were secured by receipts issued by Limited.

4. On November 19, 1963, Allied filed a petition in bankruptcy in the United States District Court for the District of New Jersey and was shortly thereafter adjudicated a bankrupt.

5. After Allied's collapse it was discovered that much of the oil covered by Limited's receipts had been removed from its tanks and a large number of receipts were forgeries.

#### Formation of the OCC

6. On December 30, 1963, Limited filed for reorganization under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York. Shortly thereafter, its creditors formed an unofficial creditors' committee made up of attorneys representing some of the largest creditors.

7. On January 28, 1964, the first meeting of creditors was held. The members of the unofficial creditors' committee were elected the OCC.

8. At the same meeting an officer of Bunge Corporation, the second largest creditor, was elected secretary of the OCC.

9. The composition of the OCC was as follows:

<u>Committee Member</u>	<u>Law Firm</u>	<u>Clients</u>
David Hartfield, Jr. (Chairman)	White & Case	Continental Illinois National Bank and Trust Company of Chicago
Thomas Daly	Lord, Day & Lord	Scarburgh Co. John E. Staren Co.
Lloyd K. Garrison	Paul, Weiss, Rifkind, Wharton & Garrison	Continental Grain Company Keyser Ullman, Limited
Roy C. Haberkern, Jr.	Milbank, Tweed, Hadley & McCloy	Chase Manhattan Bank
Donald Marks	Baer & Marks	J.R. Williston & Beame, Inc.
William Curtis Pierce	Sullivan & Cromwell	Marine Midland Grace Trust Company of New York J. Henry Schroder Banking Corporation Humko Products Ralph N. Peters

Secretary

Hamilton G. Kenner Murray H. Warschauer (General Counsel, Bunge Corporation)	Dewey, Ballantine, Bushby, Palmer & Wood	Bunge Corporation
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10. Before the members of the creditors' committee agreed to serve as such, they sought assurances that they would be compensated for their services. Certain, but not all, of the creditors agreed to contribute funds toward the expenses of the OCC in proportion to their claims.

11. There was no agreement among the creditors to seek reimbursement for such contributions from the funds of the debtor, or order of the Court providing for such reimbursement.

12. On January 28, 1964, the members of the unofficial creditors' committee were elected the OCC.

13. They retained their own firms as counsel and divided the work among themselves. They also retained the firm of Dewey, Ballantine, Bushby, Palmer & Wood whose client, Bunge Corporation, was the second largest creditor and was represented at the meetings of the OCC by one of its officers who served as secretary of the OCC.

Services Performed by OCC Members

14. The services performed by members of the OCC consisted, for the most part, of services normally performed by members of creditors' committees. They are set forth in brief in the affidavit of David Hartfield, Jr. submitted in support of the petition.

The Petition

15. The petition of the OCC seeks reimbursement for the creditors of the amounts they have contributed to pay the fees of members of the OCC. The petition asks for an order granting "to petitioners an allowance on account for services rendered by them herein".

16. The petition does not indicate that reimbursement is sought for fees, if any, of persons other than members of the OCC. The petition does not set forth in detail what services were performed, who performed them, the hours worked and the rates charged.

Scarburgh's Position

17. Scarburgh is the largest creditor of Limited. It opposes the request of the majority of the members of the OCC on the grounds that there is no basis in law for payment of the fees of the members of the OCC out of the funds of the debtor. Alternatively, Scarburgh asserts that the petition lacks essential information concerning the services performed and is therefore totally deficient.

OCC Members Cannot Be Compensated

18. The law is clear that members of creditors' committees are not entitled to be paid for their services, Lane v. Haytian Corporation of America, 117 F.2d 216 (2nd Cir. 1941), cert. denied, 212 U.S. 508; Nassberg v. Rockwell Baking Corporation, 172 F.2d 554 (2nd Cir. 1949); In re National Plastikwear Fashions, Inc., Bkcy. 89251, Op. No. 20990, 1964 CCH Bankruptcy Reporter, Transfer Binder #58,064 (D.C.N.Y. 1954); 8 Collier on Bankruptcy, ¶5.35[5].

19. In Lane, the official creditors' committee petitioned for an allowance for the services of Lane as secretary and Williams as attorney for the committee, of which they were also members. The court held that the allowable expenses of the official creditors' committee,

"certainly cannot include any form of compensation to Committee members themselves, whether as agents or solicitors of agents or otherwise. Further, no allowance should be made to any agents so far as they either perform tasks within the compass of the Committee's own duty or act for the debtor, as in the active solicitation of assents to the proffered plan."

117 F.2d at 221

As the decisions in Nassberg and Plastikwear indicate the rule in Lane is still the law today.

20. The OCC cites no authority either in statute or case law which would permit them to receive an allowance for their services as committee members or as attorneys for the committee. To allow such compensation would be a preference and would force the creditors not represented on the OCC to pay for the education of the attorneys which represent the largest creditors in addition to the education of their own.

21. To deny the petition would work no hardship upon the OCC members. They have been paid except for a small amount. Furthermore, while they indicated before being elected that they would not serve without compensation, they allege no agreement,

and indeed there was none, that their fees and expenses would be recovered from the debtor.

The Petition is Deficient

The Petition is Deficient

22. The petition states on page 3 that the OCC seeks "an allowance on account for services rendered by...[the petitioners] herein and their out-of-pocket disbursements..." If the petition is viewed by the Court as seeking, in part, an allowance for certain services performed by employees of the law firms of the OCC members and of Dewey, Ballantine, Bushby, Palmer & Wood, the petition is deficient.

23. Bankruptcy Rule 16(g) of the General Bankruptcy Rules of this Court requires that any "application for attorney's fees hereunder shall state the hours spent by an attorney or attorneys for which compensation is sought."

24. On March 13, 1974, the Second Circuit in City of Detroit v. Grinnell Corporation, F.2d Docket No. 73-1211, (2nd Cir. 1974), (portion of opinion about fees reported in N.Y.L.J., March 19, 1974, p. 5 Col. 1-5) set forth a comprehensive guide to be followed in determining allowances for attorneys fees. The Court set forth three facts that should be considered in determining the propriety of an award:

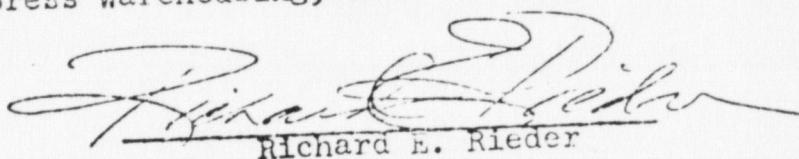
1. The time spent on the matter.

2. The way in which that time was spent, (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates).

3. The effect of other factors such as the risk of litigation and the probability of success.

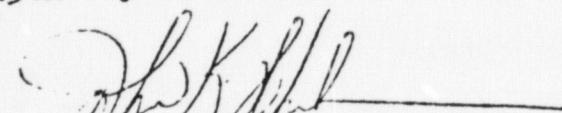
25. None of those factors are set forth in detail in the moving papers. Only a summary of each proceeding in which the OCC participated is set forth. The petitioners have failed to identify the attorneys who performed the work, the hours spent, rates charged, the nature of the work performed and the risks involved.

WHEREFORE, claimant Scarburgh Company, Inc., respectfully requests that the petition for reimbursement of the fees of the members and secretary of the OCC from the funds of American Express Warehousing, Ltd. should be denied.



Richard E. Rieder

Sworn to before me this  
25th day of March, 1974



Notary Public

JOHN K. WHELAN  
Notary Public, State of New York  
No. 60-4636210  
Qualified in Westchester County  
Certificate filed in New York County  
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In the Matter :  
of : In Proceedings for  
AMERICAN EXPRESS WAREHOUSING, LTD., : an Arrangement  
Debtor. : No. 63-B-1021  
-----X

MEMORANDUM OF  
SCARBURGH COMPANY, INC.  
IN OPPOSITION TO THE  
PETITION OF THE MEMBERS  
AND SECRETARY OF THE  
OFFICIAL CREDITORS  
COMMITTEE FOR AN ALLOWANCE  
FOR THEIR FEES HEREIN

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## THE NATURE OF THE PETITION

The petition of the Official Creditors Committee ("OCC") of the debtor herein, American Express Warehousing, Ltd., ("Limited"), seeks to obtain an allowance for the fees of its members and secretary in this proceeding.

As the affidavit of David Hartfield, Jr., Esq.\* makes clear, the members and secretary of the OCC are the attorneys for several of the largest creditors of Limited. While they have served as members of the OCC as representatives of all of the creditors of Limited, they have also represented their individual clients' interests in this proceeding. They have all been paid for their services as members of the OCC, except for approximately \$40,000 in fees and the \$50,000 sought by the secretary, out of funds contributed by some of the creditors. At the request of a majority, but not all, of the members of the OCC, they now seek reimbursement for their clients and the other contributing creditors out of the funds of the debtor. The petition requests an allowance for the amounts paid to the members of the OCC, their unpaid fees and the \$50,000 requested by the secretary.

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\*Sworn to March 7, 1974, hereinafter referred to as "H" followed by the paragraph of the affidavit.

Scarburgh Company, Inc. ("Scarburgh"), the largest creditor (by over ten million dollars in actual losses), opposes the request of the majority of the members of the OCC on the grounds that there is no basis in law for payment of the fees of the members of the CCC out of the funds of the debtor. Alternatively, Scarburgh asserts that the petition lacks essential information concerning the services performed and is therefore totally deficient.

FACTSBackground

Limited, a wholly owned subsidiary of American Express Company ("Amexco") was engaged in warehousing oils and animal fats. It operated a tank farm in Bayonne, New Jersey comprised of tanks leased to it by Allied Crude Vegetable Oil Refining Corporation ("Allied"). Allied operated a refining plant connected to Limited's tank farm.

Limited issued receipts to suppliers of commodities stored in its tanks and to dealers, brokers, and financial institutions as security for loans made to Allied or for its account. Scarburgh was one such broker. It loaned a total of over \$25,000,000 to Allied. Many of such loans were secured by receipts issued by Limited.

On November 19, 1963 Allied filed a petition in bankruptcy in the United States District Court for the District of New Jersey and was shortly thereafter adjudicated

a bankrupt. The investigation which followed disclosed that much of the oil covered by Limited's receipts had been removed from its tanks and a large number of receipts were forgeries.

Formation of the OCC

Thereafter, Limited filed for reorganization under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York. Its creditors formed an unofficial creditors committee. Normally, such committees are formed of officers or representatives of the largest creditors. However, in this instance, attorneys from the law firms which represented the largest creditors were elected. The one exception was Bunge Corporation, the second largest creditor. While it was not represented by a member of the committee as such, one of its officers and later its general counsel served as secretary of the committee. The composition of the committee was as follows:

COMMITTEE MEMBERDavid Hartfield, Jr.  
(Chairman)

Thomas Daly

Lloyd K. Garrison

Roy C. Haberkern, Jr.

Donald Marks

William Curtis Pierce

LAW FIRM

White &amp; Case

Lord, Day &amp; Lord

Paul, Weiss,  
Rifkind, Wharton  
& GarrisonMilbank, Tweed,  
Hadley & McCloy

Baer &amp; Marks

Sullivan &  
CromwellCLIENTSContinental Illinois  
National Bank and  
Trust Company of ChicagoScarburgh Co.  
John E. Staren Co.Continental Grain  
Company  
Keyser Ullman, Limited

Chase Manhattan Bank

J. R. Williston &  
Beame, Inc.Marine Midland Grace  
Trust Company of  
New York  
J. Henry Schroder  
Banking Corporation  
Humko Products  
Ralph N. PetersSecretaryHamilton G. Kenner  
Murray H. Warschauer  
(General Counsel,  
Bunge Corporation)Dewey, Ballantine, Bunge Corporation  
Bushby, Palmer &  
Wood

Before the members of the creditors' committee agreed to serve as such, they sought assurances that they would be compensated for their services (E, 19). A "substantial number" of the creditors agreed to contribute funds toward the expenses of the OCC in proportion to their claims, (H, 24). Not all of them agreed to do so, however. Furthermore, there was no agreement among the creditors to seek reimbursement for such contributions from the funds of the debtor, or order of the Court providing for such reimbursement.

On January 28, 1964 the members of the unofficial creditors' committee were elected as the OCC. As such, they decided to retain their own firms as counsel and divide the work among themselves. They also decided to retain the services of Dewey, Ballantine, Bushby, Palmer & Wood whose client Bunge Corporation, was the second largest creditor and was represented at the meetings of the OCC by one of its officers and later its General Counsel who served as Secretary of the OCC.

Services Performed by OCC Members

As described in the Hartfield affidavit, the services performed by members of the OCC consisted, for the most part, of services normally performed by members of creditors' committees.

They conducted a factual investigation (H,27,28,30); prepared a report for the creditors, (H,31); participated in proceedings in other states (H,37,38,64); negotiated with the Allied trustee (H,66); negotiated with the trustee in bankruptcy of Ira Haupt & Company (H,71,73); litigated a motion by Limited to strike the claims of the receipt holders (H,78,79); analyzed, reported on and participated in negotiations settling the claims of Limited against its insurers (H,84,88); negotiated a settlement of the claim of Proctor & Gamble (H,95); negotiated a settlement with certain "reclamation creditors" (H,99); and assisted in the litigation concerning the claim of Bayonne Industries, Inc. for the use of certain tanks leased to Allied (H,108). Finally, the OCC carried on exclusive negotiations with counsel for Amexco (H,32,43) and negotiated with groups of creditors (H,44,59), resulting in the Agreement Among Creditors and the Final Amexco Proposal.

The Petition

The petition of the OCC seeks reimbursement for the creditors of the amounts they have contributed to pay the fees of members of the OCC. That the petitioners seek reimbursement for their personal fees is obvious from the petition and the Hartfield affidavit. The petition asks for an order granting "to petitioners an allowance on

account for services rendered by them herein." The Hartfield affidavit states (H, 2):

"[W]hen the OCC came into being the then projected time consuming and long effort necessary to resolution of the multi-faceted problems impelled some interim method of providing compensation for the OCC members. Accordingly various of the creditors agreed to and have advanced funds for the compensation of the OCC members....."

Mr. Hartfield later reiterates the concern of the OCC members about payment of their fees (H, 19):

"...I outlined the grave prospects facing the creditor group and suggested to them that I and others would act as their committee if appointed by the Court and if we could be assured of being paid for our services as Committee...."

Finally, he states (H, 24):

"In order to finance the work of the OCC it was decided that each of the firms of the members of the OCC should periodically bill the OCC for the services of the members of the OCC and the staffs of the respective firms rendered to the OCC as distinguished from services rendered to clients of members of the OCC."

The petition does not allege, and such is not the case, that the creditors agreed that the fees of the OCC would be recovered from the funds of the debtor.

Finally, the petition does not indicate that reimbursement is sought for fees, if any, of persons other than members of the OCC. Of course, if such fees were sought, the petition would have set forth what services were performed, who performed them, the hours worked, and the rates charged. Those facts are not set forth.

ARGUMENTPOINT IMEMBERS OF A CREDITORS' COMMITTEE ARE NOT  
ENTITLED TO COMPENSATION FROM THE DEBTOR

The application of the OCC seeks reimbursement to certain creditors for the funds they advanced to pay the fees of the members of the committee. The law is clear that they are not entitled to such reimbursement. Lane v. Haytian Corporation of America, 117 F.2d 216 (2nd Cir. 1941), cert. denied, 212 U.S. 508; In re Realty Associates Securities Corp., 69 F.2d 41 (2nd Cir. 1934), cert. denied, 292 U.S. 628; In re Siegel, 252 F. 197 (S.D.N.Y. 1918), reversed on other grounds 256 F. 226 (2nd Cir. 1919); Nassberg v. Rockwell Baking Corporation, 172 F.2d 554 (2nd Cir. 1949); In re National Plastikwear Fashions, Inc., Bkcy. 89251, Op. No. 20990, CCH Bankruptcy Reporter Transfer Binder ¶58,064 (D.C.N.Y. 1954). This rule is succinctly stated in Collier (8 Collier on Bankruptcy, ¶5.35[5], pp. 737, 738):

"Compensation in any form cannot be allowed to committee members themselves, whether as committee members, or as agents for the committee, or as solicitors for a committee agent or otherwise. But an allowance of compensation for services to attorneys, accountants, and other agents of the official committee, assuming they are

not members of the committee, has been recognized as proper." (Emphasis supplied)

The leading case is a Second Circuit decision, Lane v. Haytian Corporation of America, 117 F.2d 216 (2nd Cir. 1941), cert. denied, 212 U.S. 508. There, the debtors promised the creditors that if the plan of arrangement were confirmed they would pay the compensation and expenses and disbursements of "... the Creditors' Committee duly appointed by the Court,...whose expenses shall include the fees and disbursements of their respective attorneys and counsel,..." 117 F.2d at 217. After confirmation of the plan, the official creditors' committee petitioned for an allowance for the services of Lane as secretary and Williams as attorney for the official creditors' committee, of which they were also members. The court held that the allowable expenses of the official creditors' committee,

"certainly cannot include any form of compensation to Committee members themselves, whether as agents or solicitors of agents or otherwise. Further, no allowance should be made to any agents so far as they either perform tasks within the compass of the Committee's own duty or act for the debtor, as in the active solicitation of assents to the proffered plan." 117 F.2d at 221

The court in Lane reasoned that such an agreement amounted to an illegal preference of the type prohibited in the composition proceedings which preceded the enactment of Chapter XI bankruptcy statutes.

The rule in Lane is based upon previous decisions in the Second Circuit and Southern District. In re Realty Associates Securities Corp., supra, involved an appeal from an order denying confirmation of a composition agreement which provided for compensation of three creditors committees and their counsel out of funds of the debtor. The Second Circuit in affirming the denial referred to In re Siegel, supra, and stated:

"[N]othing said there justifies allowances such as are made here to committees and their counsel. To permit these allowances to be paid out of the composition fund or by the bankrupt would improperly favor some creditors and pro tanto defeat the act's and the court's purpose of equality."

In re Siegel, supra, involved considerations analogous to those present in this proceeding. In an opinion by Learned Hand the Court stated (252 F. at 198):

..."Courts have been extremely zealous to secure equality of distribution among creditors... In compositions, however, the motive is much stronger, since the bankrupt

commonly procures the consideration divided, at least in part, from sources outside the estate. Obviously the measure of the dividend he offers will in part be determined by the 'cost of the proceedings' in the language of section 12b. If the court permits him to include in that amount the several expenses of creditors, it diminishes pro tanto the available residue for dividends. Hence there is a stronger reason to apply the rule strictly in compositions than upon discharges, where the funds which will actually be distributed are already in the custody of the court and cannot be affected."

While this case was later reversed on other grounds, the reasoning quoted is still valid and has been cited with approval in many cases since then including In re Realty Associates Securities Corp., supra, 69 F.2d at 44, and Lane v. Haytian Corporation of America, supra, 117 F.2d at 220.

The decisions reached since Lane have followed the rule set forth in that case. In Nassberg v. Rockwell Baking Corporation, 172 F. 2d 554,555 (2d Cir. 1949) the court stated in pertinent part:

"Nassberg was a member of the creditors' committee....As such, he is precluded from receiving compensation for his services under the ruling in our recent decision in Lane v. Haytian Corporation of America, 2 Cir., 117 F.2d 216."

A later case, decided in this Court, In re National Plastikwear Fashions, Inc., Bkcy. 89251, Op. No. 20990 (S.D.N.Y. 1954) (summary reported in 1964 CCH Bankruptcy Reporter Transfer Binder ¶58,064), is practically identical to the situation presented here. Two attorneys elected them-

selves to the creditors' committee. They then appointed themselves the attorneys for it. When they petitioned for an allowance based on their seivices as attorneys, the referee denied their request. Upon review, Judge Sugarman affirmed the referee's opinion. Citing Lane and Nassberg and 8 Collier on Bankruptcy, 14th Ed., 565, he stated:

"Mr. Lewis and Mr. Friedman, having been members of the official creditors' committee when their services were rendered are not entitled to payment of any compensation for such services.

Unless and until our Circuit Court excludes attorneys from the broad prohibition announced by it in the cited cases, referees and district courts are constrained to apply it literally."

It has long been a policy of courts construing bankruptcy statutes to deny allowances unless the statute specifically provided for it. In re Realty Associates Securities Corp., 69 F.2d 41, cert. denied, 292 U.S. 628 (2nd Cir. 1934); Shongut v. Golden, 270 F.2d 238 (2nd Cir. 1959), cert. denied, 362 U.S. 918; In re Boros & Reiss Art Weave Mills, Inc., 170 F. Supp. 937 (D.C.N.J. 1959) (specifically in relation to creditors' attorneys' fees.)

At the time the OCC was formed, the applicable statute, 11 U.S.C.A. §737, made no mention of compensation to members of creditors' committees for their services. That statute remained in effect during the period when all but an

insignificant amount of the services for which reimbursement is sought were performed. Accordingly, that statute applies to the application of the OCC. In re Higgenbotham, 430 F.2d 155 (7th Cir. 1970).

While that statute reflects two amendments to the statute in effect when Lane was decided, neither had any effect upon the rule laid down in Lane that the allowable expenses of the official creditors' committee cannot include compensation to committee members for their services as such or as attorneys for or secretary of the committee.

The first amendment to §737 was enacted in 1952. This amendment changed the statute to allow an unofficial creditors' committee to recover certain expenses in specific cases. It did not provide for compensation to members of an official creditors' committee. In re National Plastikwear Fasions, Inc., supra. The second amendment, in 1958, simply replaced a few words which had been inadvertently left out in 1952. House Report No. 183, March 6, 1957. (See discussion in U.S. Code Congressional and Administrative News, 1958, p.3814).

The statute was again amended in 1967. However, that amendment also did not alter the rule in Lane and is applicable only to services performed after its effective date. See also,

"Creditors Committees and Their Responsibilities", by Chauncey H. Levy, 74 Commercial Law Journal, 355, 360, December, 1969.

Accordingly, the rule set forth in Lane and followed in Nassberg and Plastikwear is the law today and should be applied to the petition.

In effect, the OCC is attempting to circumvent an established rule in bankruptcy proceedings against illegal preferences. Certainly officers of creditors who served on a creditors committee could not recover their expenses. Lane, Nassberg, and Plastikwear all indicate that the same rule applies when, as here, attorneys are elected to the committee.

Indeed, the OCC cites no authority either in statute or case law which would permit them to receive an allowance for their services as committee members or as attorneys for the committee. There is none. It would be inequitable for the creditors not represented on the OCC to pay for the education of the attorneys which represent the largest creditors and pay the fees of their own attorneys besides.

Finally, while the OCC members indicated before being

elected that they would not serve without compensation (H,19) they allege no agreement, and indeed there was none, that their fees and expenses would be recovered from the debtor.

POINT II

THE PETITION DOES NOT CONTAIN  
FACTS UPON WHICH AN ALLOWANCE  
MAY BE BASED

The petition states on page 3 that it seeks "an allowance on account for services rendered by... [the petitioners] herein and their cut-of-pocket disbursements..."

As has been shown under Point I, compensation for services of members of the OCC would be improper under the Lane rule. However, if this petition is viewed by the Court as seeking, in part, an allowance for certain services performed by employees of the law firms of the OCC members and of Dewey, Ballantine, Bushby, Palmer & Wood, the petition is deficient.

Bankruptcy Rule 16(g) of the General Bankruptcy Rules of this Court requires that any "application for attorney's fees hereunder shall state the hours spent by an attorney or attorneys for which compensation is sought."

The basis of the OCC request is a very vague and general description of the services performed and the fact that creditors have paid the OCC \$807,980.84 to date. There is no detailed listing of hours spent, by whom, at what rate of compensation, or on what matter. Without such a list, it is impossible to adequately value the services received,

determine the propriety of charges, or determine if work was duplicated. Such facts are required to be set forth. In re Hudson & Manhattan Railroad Company, 339 F.2d 114 (2nd Cir. 1964). In that case Judge Lumbard stated (339 F.2d at 115):

"We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required."

The disclosure of such information is clearly required in petitions for allowances in bankruptcy. In In re Wal-Feld Co., 345 F. 2d 676 (2nd Cir. 1965) the Second Circuit refused to increase an allowance of \$10.00 per hour for the trustee's attorneys in a Chapter XI proceeding. The court, citing Hudson, stated that as the record did not contain the details necessary to value the claimed expenditure of time, it would affirm the lower court order.

Again in In re Imperial "400" National, Inc., 432 F.2d 232 (3rd Cir. 1970) the Third Circuit in lowering an interim fee allowance to a reorganization trustee's attorney (432 F.2d at 239) stated:

"While minute detail should not be required in an interim application, there is nothing in the record from which a court could estimate how much work was productive or necessary, how much work required treac-

ment by experienced attorneys, or to what extent the services rendered were duplicative. It may also be possible that time not legally compensable, such as that spent in applying for or in defending interim fee awards or in travelling to the offices of the debtor, was included in the accounting." (footnotes omitted)

In re Webb & Knapp, Inc., 363 F. Supp. 423, 426 (S.D.N.Y. 1973) held that "no compensation is awarded for services which were unnecessary or wasteful." The court stated that such a determination cannot be made without "accurate and current time records."

Recently, on March 13, 1974, the Second Circuit reaffirmed its requirement that a fee allowance must be based upon accurate time records. City of Detroit v. Grinnell Corporation, \_\_\_\_ F.2d \_\_\_\_ (Docket No. 73-1211, 2nd Cir. 1974, portion of opinion about fees reported in N.Y.L.J., March 19, 1974, p.5, Col. 1-5.) In so doing, the court set forth a very comprehensive guide to be followed in determining fee allowances. While the Grinnell decision involved an allowance for fees of plaintiff's counsel in an antitrust settlement, the guidelines are still applicable to a large extent in the case at hand. The Court stated:

"The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expanded [sic] on the case."

\* \* \*

"Once the district court ascertains the number of hours that the attorney and his firm spent on the case, it must attempt to value that time.

Valuation obviously requires some fairly definite information as to the way in which that time was spent, (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates)."

The Court held that the difficulty of the particular work will affect the rate at which it is compensated:

"Petitioner, likewise, provides no breakdown of any of the time claimed into the various facets of the case. It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties."

The Hartfield affidavit glosses over this requirement (H,109):

"While the foregoing recitals are but a broad outline of the scope of the issues, the number of creditors and amounts involved, the overall enormity of the problems and the efforts of the members of the OCC, those

factors are well known to the Court which oversaw the proceedings through this now ten year period necessary to resolution."

Such a statement is totally inadequate. It affords objectors no basis upon which to determine if the fee application is justified. As the Second Circuit stated in Grinnell:

"It is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. \* \* \* The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objections to a petitioner's fee claim."

See also In re Ira Haupt & Co., 361 F.2d 164, 168, (2nd Cir. 1966), where Judge Friendly stated: "The conduct of bankruptcy proceedings not only should be right but must seem right."

After completion of the first two steps, the court in Grinnell held that the effect of other "less objective factors" such as the "risk of litigation" and "probability of success" should be considered. None of those factors are described in detail in the moving papers. Only the bare facts of each proceeding are set forth.

If the petitioners are seeking reimbursement for work performed by attorneys other than members of the OCC, the petition does not make that fact clear. Certainly, nearly all the fees charged were for the work of the members of the OCC. As shown in Point I, reimbursement cannot be made from the funds of the debtor for that work. To the extent reimbursement is sought for the work of other attorneys, the failure of petitioners to identify those attorneys, and set forth the hours spent, rates charged and the nature of the work performed makes it literally impossible to evaluate any fees charged.

CONCLUSION

Based upon the foregoing reasons and authorities, the petition for reimbursement of the fees of the members and secretary of the OCC from the funds of the American Express Warehousing, Ltd. should be denied.

Respectfully submitted,

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Charles L. Stewart  
Richard E. Rieder  
Rigdon H. Boykin  
Of Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x  
In the Matter : Sylvester Ryan  
of : U.S.D.J.  
AMERICAN EXPRESS WAREHOUSING, LTD. : IN PROCEEDINGS FOR  
Debtor. : AN ARRANGEMENT \_\_\_\_\_  
: Index No. 63-B-1041  
: SUPPLEMENTAL  
Debtor. : AFFIDAVIT  
----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

DAVID HARTFIELD, JR. being duly sworn, says:

1. I am a member of the Bar of this Court and the Chairman of the Official Creditors Committee ("OCC") of the debtor, American Express Warehousing Company, Ltd. This affidavit is submitted in supplement to my affidavit sworn to March 7, 1974 filed herein on March 8, 1974.

2. The purpose of this affidavit is to set forth the time in hours which were expended by the partners and associates of the several firms involved in rendering legal services for the OCC.

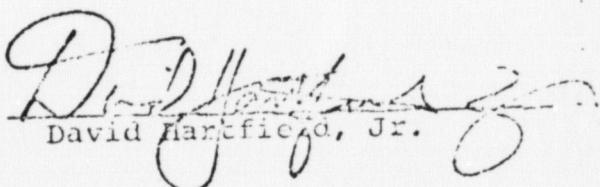
3. As to White & Case, of which I am a member, I caused a review of the diary entries which are kept in the regular course to record the time and an abbreviated statement of the nature of the service. I determined that 1,984.4 hours of partners' time and 1,330.5 hours of associates' time were

devoted to legal services for the OCC. During the course of those services of which I was in charge I know of my own knowledge that specific care was taken to enter and record the services to the OCC separately and apart from services rendered to the individual creditor represented by White & Case. Based on that knowledge and the diary review I represent to the Court that those hours were expended on OCC matters exclusively.

4. As Chairman of the OCC I have requested of the several members and Messrs. Dewey, Ballantine, Bushby, Palmer & Wood a statement of the hours devoted exclusively to OCC matters. I have prepared the following schedule based upon the information which they have supplied. The White & Case hours have been integrated therein in order to reflect the aggregate total.

<u>Law Firm</u>	<u>Hours</u>			<u>Fees</u>
	<u>Partners</u>	<u>Associates</u>	<u>Total</u>	
Baer & Marks	703.5	242.0	945.5	\$ 57,818
Lord, Day & Lord	52.0	676.0	1,485.0	76,715
Milbank, Tweed, Hadley & McCloy	401.75	1,126.75	1,528.5	65,752
Paul, Weiss, Rifkind, Wharton & Garrison	652.5	1,777.25	2,429.75	110,650
Sullivan & Cromwell	856.0	1,947.0	2,803.0	160,900
White & Case	1,984.4	1,330.5	3,314.9	199,800
Dewey, Ballantine, Bushby, Palmer & Wood	440.0	1,156.0	1,600.0	77,000
<b>Total</b>	<b><u>5,851.15</u></b>	<b><u>8,255.5</u></b>	<b><u>14,106.65</u></b>	<b><u>\$748,635</u></b>

Respectfully Submitted

  
David Hartfield, Jr.

Sworn to before me this  
27 day of March 1974.

Augusta Seaman  
Notary Public

AGUSTA SEAMAN  
Notary Public, State of New York  
No. 24-59705  
Qualified in Westchester  
Certificate Issued in New York City  
Commission Expires 11-11-2011

J 101a

UNITED STATES DISTRICT COURT:  
SOUTHERN DISTRICT OF NEW YORK

----- x  
In the Matter : No. 63-B-1021  
of : IN PROCEEDINGS  
AMERICAN EXPRESS WAREHOUSING, LTD., : FOR AN ARRANGE-  
M'NT

Debtor. :  
----- x

MEMORANDUM OF THE MEMBERS AND  
SECRETARY OF THE OFFICIAL  
CREDITORS COMMITTEE IN REPLY  
TO THE MEMORANDUM OF SCARBURGH  
COMPANY, INC. IN OPPOSITION TO  
THE PETITION OF THE MEMBERS  
AND SECRETARY OF THE OFFICIAL  
CREDITORS COMMITTEE FOR AN  
ALLOWANCE FOR THEIR FEES  
HEREIN

FACTS

The application of the Official Creditors Committee ("OCC") of the debtor, American Express Warehousing Company, Ltd., for an allowance, (1) for its services and disbursements from the time of its organization on January 28, 1964 to date, and (2) for the services and disbursements of the secretary and acting secretary (the "Secretary") of the OCC for the same period, arises out of the so-called "Salad Oil Swindle" -- a factual and legal background singularly unique in Bankruptcy annals.

When the debtor filed its Chapter XI petition, creditors held valid and forged warehouse receipts for hundreds of millions of dollars of oil supposedly held in the debtor's warehouse tanks. After the discovery of monumental fraud, the relatively small amount of oil that remained in the tanks was sold for only \$6,000,000.

At any early meeting of creditors and their lawyers, it was decided that in light of the extraordinary complex legal problems which hindered any recovery for the class of creditors as a whole, an extraordinary sort of creditors committee was required. As a result, the OCC, composed entirely of lawyers, was elected to harmonize the numerous complicated claims against the debtor aggregating approximately \$144,000,000. Because of its unique composition, the OCC concluded that it would be unnecessary and

J 103a

wasteful to retain outside counsel for the committee since each of the members of the OCC had at his disposal the staff of his law firm. Therefore (with the exception of the retention of Messrs. Dewey, Ballantine, Bushby, Palmer & Wood) the members of their staffs were organized into investigating teams to dig out the facts and study and resolve the various legal problems which were presented as a result of this work.

Creditors meetings were held to discuss the legal problems which were to be dealt with by the OCC and to inform the creditors as a group of various developments. The members of the OCC, in turn, agreed to and did distinguish between legal charges properly chargeable to the OCC and the legal charges to their own clients. In order to finance the work of the OCC it was decided that each of the firms of the members of the OCC should periodically bill the OCC for the legal services to the OCC by their respective staffs. The creditors were requested as a group to contribute to the OCC pro rata in relation to the face amount of receipts, forged or not forged, in order to defray the large legal expenses of the committee. While a substantial number of creditors agreed to contribute on this basis, a few creditors did not do so. Scarburgh Inc. contributed <sup>1/4 of</sup> the nominal amount of approximately \$1000. <sup>1/4 of</sup> ~~1/4 of~~

The extensive and extraordinary legal services of the OCC, which are outlined in the Affidavit of David Hartfield, Jr., Esq., sworn to March 7, 1974 (the "Hartfield Affidavit"), transformed a nightmare featuring the fraudulent disappearance of oil for which hundreds of millions of dollars in valid and ~~corroborated~~ <sup>various</sup> receipts were in circulation into a series of intricate settlements providing for their payment by the American Express Company of approximately \$60,200,000. (See, generally, Hartfield Affidavit #26-103; see also the supplemental Affidavits of Hamilton G. Kenner, Esq. and Murray H. Warschauer, Esq., which set out in detail the services of the Secretary). This transformation, described by Judge Markowitz as "the product of legal wizardry" (Heimann v. Amer. Express Co., 53 M.2d 749, 767,279 N.Y.S.2d 867, 835 (Sp. Ct. N.Y. Co. 1967) benefited the creditors as a group. The application for allowances, therefore, is designed to recover the aggregate amount charged to the OCC for legal services and disbursements (except for those of the Secretary who is not a member of the committee) in order that the contributing creditors may be reimbursed for the amounts so contributed.

#### ARGUMENT

##### Point I

THE OVERRIDING EQUITABLE PRINCIPLES WHICH ARE APPosite TO THE SPECIAL FACTS SURROUNDING THIS APPLICATION REQUIRE THAT THE CREDITORS AS A GROUP EQUALLY SHARE THE COST OF THE LEGAL SERVICES WHICH WERE RENDERED FOR THE BENEFIT OF ALL CREDITORS AS A GROUP.

Section 339(2) of Chapter XI (11 U.S.C. §739(2) (1964)) expressly sanctions allowances to the creditors committee elected pursuant to §338 (11 U.S.C. §738 (1964)) for its expenses for "employing such agents, attorneys, and accountants as may be necessary to assist in the performance of its functions" (§339(1), 11 U.S.C. §739(1) (1964)), provided that the arrangement is confirmed and to the extent such expenses are deemed reasonable and necessary by the court. The OCC was duly elected on January 28, 1964, the arrangement has been confirmed, and the expenses that are sought arise out of the employment of law firms. The activities performed by the OCC, which are well known to the court, fall squarely within the outline of creditors committee functions outlined in §339(1) of Chapter XI. That the expenses of the OCC were reasonable and necessary and were legal in nature would appear to be beyond cavil in light of Judge Markowitz's statement that:

". . . the contribution of members of the OCC conforms to the highest tradition of the legal profession. It kept at bay proliferating lawsuits which gave promise of flooding the courts for many years to come. The averted litigation would have proven complicated, costly and time-consuming." Heimann v. Amer. Express Co., supra. 53 M.2d at 767, 279 N.Y.S.2d at 885.

It is argued that the unusual allowance being sought for the expenditures and services of this unique

creditors' committee\* are not expressly provided for by the Bankruptcy Act and are therefore not allowable.

Lane v. Haytian Corp., 117 F.2d 216, cert. denied 313 U.S. 580 (1941). However, the Lane case dealt with an informal creditors committee, which is not the situation in the instant case. Moreover, the harshness of the Lane decision has twice been criticized and limited by Congressional amendments to the Bankruptcy Act which were designed to make much more flexible the circumstances under which compensation to the creditors committee would be allowed.

(See the discussion in 8 Collier on Bankruptcy, ¶5.35[5] at 737-741 (1971).

Similarly, the other cases cited by claimant Scarburgh Company, Inc. in its Memorandum in Opposition to the Petition of the ~~Members~~ and Secretary of the Official Creditors Committee for an Allowance for Their Fees Herein are factually distinguishable. Both In re Realty Associates Securities Corp., 69 F.2d 41 (2d Cir.), cert. denied, 292 U.S. 628 (1934), and In re Siegel, 252 F. 197 (S.D.N.Y. 1918), reversed, 256 F.2d 226 (2d Cir. 1919), arose prior to enactment of the Chandler Act (1939) [see, generally,

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\* Neither the Secretary nor any member of Messrs. Dewey, Ballantine, Bushby, Palmer & Wood are members of the OCC.

11 U.S.C. §§1-1255 (1964)], and on that ground alone can be distinguished. Compare: In re Casco Fashions, Inc., 346 F. Supp. 1252, 1256 (S.D.N.Y. 1972). Furthermore, the cases are distinguishable in that In re Realty Associates Securities Corp. dealt with an informal bondholders committee, whose services were found not to be helpful or solicited (69 F.2d at 42), and In re Siegel concerned an application for the expenses of the attorney to the creditors committee which expense was not recoverable under the law as it then existed, but now is explicitly permitted under Chapter XI (See §339(1), 11 U.S.C. §739(1) (1964)). Moreover, contrary to suggestions by claimant Scarburgh Co., Inc., In re Siegel was reversed by the Second Circuit (which reinstated the allowance) on the grounds that the district court lacked subject matter jurisdiction under the law as it then read to deny the allowance to the attorney to the creditors committee. Thus, anything that was said by the district court about the law as it then stood is wholly irrelevant to the law as it now stands and to the application by the OCC.

Nassberg v. Rockwell Baling Corporation, 172 F.2d 554 (2d Cir. 1949), not only involved a decision dealing with Chapter XI prior to the two substantial amendments compelled by the Lane decision mentioned above, but also dealt with an application by an individual member of the

creditors committee for his own non-legal services, both of which circumstances render it distinguishable from the instant case. In re Boros & Reiss Art Weave Mills, Inc., 170 F. Supp. 937 (D.N.J. (1959)), and Shangut v. Golden, 270 F.2d 238 (2d Cir. 1959) involved an allowance sought by parties in aborted Chapter XI proceedings. Here we have confirmed proceeding. Such cases dealt with allowances that are specifically denied by the provisions of Chapter XI, which only recognizes the expenses of a creditors committee when the plan of arrangement has been accepted, and are therefore entirely distinguishable from the OCC application arising out of a successful arrangement.

The claimant's reliance on In re Higginbotham 430 F.2d 155 (7th Cir. 1970), is equally misplaced. Higginbotham, unlike the instant case, dealt with expenses sought in an aborted Chapter XI proceeding. Moreover, in granting the allowances sought by the secretary and attorneys to the creditors committee despite the literal language of the statute then in force, the Seventh Circuit demonstrated the more flexible approach currently favored by the courts of granting allowances which may not be specifically provided for under Chapter XI but which nevertheless result in services clearly benefiting the estate of the debtor. (See the discussion infra, of In re Casco Fashions, Inc., 346 F. Supp. 1252 (S.D.N.Y. 1972)

which cites the flexible Higginbotham approach to such allowances with approval). Finally, the Seventh Circuit in Higginbotham in reaching its equitably appealing result, held that compensation of a creditors committee whose activities occurred prior to the 1961 Amendment to the Bankruptcy Act should be governed by the statute then in effect. (11 U.S.C. §737(2) prior to its amendment). There is nothing in the language of the then applicable statute\*, the present statute, or the legislative history of the past or present law which would suggest that activities of the OCC rendered herein would not be compensable. (See, generally, 1952 U.S. Code Congressional and Administrative News 1930-1931; 1967 U.S. Code Congressional and Administrative News 2007-2010).

In re National Plastikwear Fashions, Inc., Bkcy.

89251, Op. No. 20990 (S.D.N.Y. 1954) is equally distinguishable. Not only does the case employ a highly restrictive reading of the 1952 Amendment to Chapter XI concerning compensable allowances for the creditors committee and a heavy reliance on the much criticized, now expiring Lane decision, there is no suggestion in Plastikwear that the services were highly beneficial to the estate and to the creditors as a group.

\* §337(2) (11 U.S.C. §737(2)) then provided that upon acceptance of the plan of arrangement the debtor shall deposit

"... the money necessary to pay . . . the actual and necessary expenses incurred in connection with the proceedings and the arrangement by the committee of creditors and the attorneys or agents of such committee, in such amount as the court may allow."

which is not contestable here.

The more recent decisions discussing the extent to which allowances, though not specifically provided for in Chapter XI, will nonetheless be permitted reflect a much more flexible trend. Thus in In re Casco Fashions, Inc., 346 F. Supp. 1252 (S.D.N.Y. 1972), - *application for counsel* Judge Lasker refused to be limited by the restrictive reading of Chapter XI urged by cases such as Lane and permitted an award to counsel for the debtor in possession in even an aborted Chapter XI proceeding even though such an award was not specifically provided for in the Act. To support its decision, the court stated:

"There are good policy reasons for permitting such an award, since the incentive of compensation will certainly stimulate constructive efforts by debtor's counsel to bring about an arrangement beneficial to all concerned." 346 F.Supp. at 1256.

Similarly, in the recent case of In re Sapphire Steamship Lines, Inc., 67 B. 252 (S.D.N.Y. March 15, 1974) (See also 171 (53) N.Y.L.J. 1, col. 5, March 19, 1974) Judge Pollack ruled that where counsel who represented two creditors had undisputedly rendered services inuring to the benefit of all of the creditors of the Bankrupt Estate as a class and which contributed to the enormous enhancement of the Estate, they were entitled to be compensated by that class on the theory that those who accept the benefits of such services must also assume a share of the expenses connected

therewith. This equitable allowance was granted despite the fact that the Bankruptcy Act did not specifically provide for such an allowance.

A similar logic commends the allowance sought here where a minimum of \$60,000,000 (actually millions more) was obtained for the estate \*. This is especially so in light of the fact that "[t]here is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Bank of Marin v. England 385 U.S. 99, 103 (1966); see also Sprague v. Taconic National Bank, 307 U.S. 161 (1939).

As Judge Pollack stated in Sapphire Steamship Lines, Inc., supra., the equitable concept of creditors equally sharing the burden of costs when a benefit has been equally conferred upon them as a class is not at all alien to the field of bankruptcy. See, In re New York Investors, Inc., 130 F.2d 90 (2d Cir. 1942). (L. Hand., A. Hand & Clark, C.J.J.). Furthermore, as stated by Judge Pollack, while the Court of Appeals has indicated its "strong reluctance to allow the assessment of any fees and costs in bankruptcy proceedings which are not expressly authorized by the Act, or that are not well established by judicial precedent .... And as a general rule no compensation or

\*The Scarborough Group (i.e. Scarborough Co., Inc. and its banks) has received approximately \$19,000,000 thus far from the funds that resulted from the efforts of the OCC.

reimbursement can be had unless a tangible benefit has been conferred on the estate to the advantage of the creditors as a whole. Saper v. John Viviane & Son, Inc., 258 F.2d 826, 828 (2d Cir. 1958) (emphasis supplied) ... these principles are not without exceptions." In the instant case, there is no question but that \$60,000,000 is a tangible benefit to the estate.\* Heimann v. American Express Co., supra, 53 M.2d at 77, 279 N.Y.S. 2d at 885.

In light of the composition of the OCC, it should also be noted that this is not a case in which members of the creditors committee are seeking an equitable adjustment by way of an allowance for compensation as individuals. Rather, the amounts paid by the creditors for the legal services were paid to the members' law firms, not to the members themselves.

## POINT II

THE SUPPLEMENTAL AFFIDAVIT FILED  
HEREIN SETS FORTH FACTS UPON WHICH  
THE ALLOWANCE SOUGHT HEREIN SHOULD  
BE GRANTED

A supplemental affidavit has been submitted breaking down the hours incurred by each of the OCC member's law firm in connection with the legal services rendered for

\* The total amount requested for legal services and that of the Secretary is less than 1.5% of the minimum recovery.

the creditors as a group. The nature of the work performed by the OCC is stated in detail in the Hartfield Affidavit # 26-108 and is well-known to this court. While a grand total of hours spent by OCC members firms amounts to 14,112.5 hours, the amount sought by such firms for the unusual services performed is modest. The court therefore has sufficient information with which to evaluate the reasonableness of the allowances sought under Bankruptcy Rule 16(g).

CONCLUSION

The application should be granted.

Respectfully submitted,

WHITE & CASE  
Attorneys for the OCC  
14 Wall Street  
New York, N. Y. 10005

Tel. No. (212) 732-1040

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

In the Matter : In Proceedings for  
an Arrangement  
of : No. 63-B-1021  
AMERICAN EXPRESS WAREHOUSING, LTD., : ORDER WITH NOTICE  
Debtor. : OF SETTLEMENT

----- x

S I R S:

PLEASE TAKE NOTICE that the within proposed Order will be presented to Judge Sylvester J. Ryan at his chambers Room 2203, United States Courthouse, Foley Square, New York City, on the 26th day of April 1974 at 10:00 A.M. for settlement and signature.

Dated: New York, New York  
April 18, 1974

Yours, etc.

WHITE & CASE  
Office and P.O. Address:  
14 Wall Street  
New York, New York 10005

TO:

The Attorneys and Parties  
listed on Exhibit A hereto.

EXHIBIT A TO PROOF OF SERVICE OF PLEADING OR NOTICE OF LITIGATION

Omitted as Unnecessary.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter :  
of : In Proceedings for  
an Arrangement  
AMERICAN EXPRESS WAREHOUSING, LTD., : No. 63-B-1021  
Debtor. : ORDER  
-----x

At New York, New York, in said district on the  
day of April, 1974.

Upon the petition of the Official Creditors Com-  
mittee of the debtor, American Express Warehousing, Ltd.,  
dated March 8, 1974 for a first and final allowance for  
legal services rendered from March 28, 1964 to date and  
through the termination of this proceeding, and for reim-  
bursement for out-of-pocket expenses and for an allowance  
for its secretary and acting secretary; and

Proof of due service upon all interested parties  
of notice of said petition and of a hearing thereon before  
this Court on March 28, 1974 having been filed; and

A hearing upon said petition having been held on  
March 28, 1974 by this Court at which the Official Creditors  
Committee of the debtor, by White & Case (David Hartfield,  
Jr., of Counsel) was heard in support of the application, et  
Amertrade, Inc., a creditor, having been heard in  
opposition by its President, Dr. Abraham Feinstein; and

Scarburgh Company, Inc., a creditor, having also been heard in opposition by Dunnington, Bartholow and Miller (Richard E. Rieder, of Counsel); and A. F. Staley Manufacturing Company, a creditor.

having communicated with the Court by a letter dated March 22, 1974 opposing said application and asking other relief, which letter has been duly filed; and

It appearing that the Official Creditors Committee was duly elected at the first meeting of creditors on January 28, 1964; and

The Official Creditors Committee having engaged in the formulation of a plan of arrangement, negotiated settlements and supervised the working of the plan by virtue of which the creditors of the debtor received in excess of \$50 million; and

The Court on May 10, 1967 having made an order confirming the debtor's plan of arrangement; and

It appearing that the legal services performed by the Official Creditors Committee and their law firms and one other law firm retained by said Committee materially contributed to the formulation, negotiation and carrying out of the plan of arrangement; and

It appearing that the complex multitudinous and unique legal problems attendant on this proceeding were recognized at inception and as a result the Official Creditors Committee was composed entirely of lawyers who could draw upon their respective large law firms to render extensive legal services; and

It appearing that at or about the time of the formation of the Committee it was recognized by the creditors and specifically told to them by the Chairman of the Committee that if the individuals who were to be chosen by the creditors were to serve it would be necessary to provide an interim method of compensating the law firms of the several members of the Committee for extensive projected legal services which were essential if there was to be a substantial recovery for the creditors of the debtor; and

The members of the Official Creditors Committee having agreed to keep and having kept separate their charges for the legal services and disbursements rendered to the Official Creditors Committee from those rendered by themselves and their law firms to their separate clients; and

A large majority of the creditors having agreed to and did advance funds from time to time to the Committee in the total amount of \$807,980.84, of which \$806,162.05 was then disbursed as follows: to law firms for legal ser-

vices and disbursements to the Official Creditors Committee (\$728,004.58), for auditing fees (\$45,218.96), and for other disbursements (\$32,938.51); and

It being recognized at the outset that such advance payments for such legal and accounting services and disbursements would have to be apportioned among the contributing creditors on an arbitrary basis during the course of the proceeding; and

The Committee having stated prior to its appointment as an Official Creditors Committee that if recovery were made and a plan effected it would seek to more equitably distribute the burden of paying for these services and disbursements; and

The petition herein seeks (1) \$806,162.05 to reimburse those creditors who advanced the necessary funds for said legal and accounting services and disbursements on the aforementioned arbitrary basis throughout the many years of this proceeding, and (2) \$31,711.37 to pay for certain legal services and disbursements not yet paid, and (3) \$50,000 for the services of the Secretary of the Committee; and

The amounts aggregating \$887,873.42 sought having been found to be fair and reasonable; and

The Court having considered the oral arguments, the record of prior proceedings and having read and filed the petition and the affidavit and supplemental affidavit of David Hartfield, Jr., sworn to March 7 and March 27, 1974, respectively, and the joint affidavit of Hamilton G. Kenner and Murray H. Warschauer, sworn to December 26 and 31, 1973, all in support of said application, and the affidavit of Richard E. Rieder, sworn to March 25, 1974, and the memorandum of Abraham Feinstein dated March 28, 1974, and the letter of A. E. Staley Manufacturing Company dated March 22, 1974, all in opposition, together with memoranda of law submitted in support of and in opposition to the petition; and

Due consideration having been had and the Court having found the application is proper under both the Bankruptcy Act and principles of Equity, and having rendered an oral decision granting the petition, as appears from the record,

NOW, THEREFORE

IT IS ORDERED, that the further relief sought in the aforementioned letter of A. E. Staley Manufacturing Company be and the same hereby is denied; and

IT IS FURTHER ORDERED, that the petition of the Official Creditors Committee of the debtor for a first and final allowance for legal services and disbursements in the aggregate amount of \$887,873.42 be and the same hereby is granted; and

IT IS FURTHER ORDERED, that such allowance shall be paid by the debtor as a Priority Claim pursuant to Article III of the debtor's plan of arrangement; and

IT IS FURTHER ORDERED, that the Official Creditors Committee of the debtor shall distribute the allowed amount

(a) \$50,000 jointly to Messrs. Hamilton G. Kenner and Murray H. Warschauer on account of their services as Secretary to the Official Creditors Committee; and

(b) \$806,162.05 to reimburse the following named creditors in proportion to the amounts each heretofore advanced to the Official Creditors Committee for legal and accounting services and disbursements, as follows:

<u>Name</u>	<u>Amount Advanced</u>	<u>Amount of Reimbursement</u>
Bank of America	\$ 80,926.71	\$ 80,744.54
Bank Leumi le-Israel B.M.	5,564.82	5,552.29
Bankers Trust Company	11,651.47	11,625.24
Bell Financial Corporation	39,702.53	39,613.16
Bunge Corporation	130,108.14	129,815.27
Cargill, Incorporated	10,584.28	10,560.45
The Chase Manhattan Bank	94,632.99	94,419.97
Continental Grain Company	39,420.83	39,332.09
Continental Illinois National Bank & Trust Company of Chicago	205,789.87	205,326.64
Garnac Grain Co.	3,519.74	3,511.82
Harris Trust and Savings Bank	2,199.06	2,194.11
Irving Trust Company	31,448.76	31,377.97
The Marine Midland Trust Company of N.Y.	13,552.66	13,522.15

<u>Name</u>	<u>Amount Advanced</u>	<u>Amount of Reimbursement</u>
Morgan Guaranty Trust Company of N.Y.	\$ 23,048.05	\$ 22,996.17
National State Bank of Newark	8,804.83	8,785.01
National Dairy Products Corporation (Humko Products Div.)	5,102.38	5,090.89
Pacific National Bank of San Francisco	14,467.48	14,434.91
M. Samuel & Co. Ltd.	9,358.57	9,337.50
Royal Meat Products	1,247.62	1,244.81
Scarburgh Company	1,758.94	1,754.93
J. Henry Schroder Banking Corp.	64,103.72	63,959.42
J. R. Williston & Beane, Inc.	10,987.39	10,962.66
Total	\$807,980.84	\$806,162.05

and, (c) \$31,711.37 to the following  
 named firms on account of legal services  
 rendered and disbursements incurred on  
 behalf of said Committee:

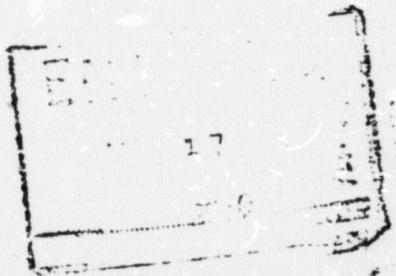
White & Case	\$ 24,820.00
Baer, Marks, Friedman & Berliner	1,568.90
Milbank, Tweed, Hadley & McCloy	1,869.05
Lord, Day & Lord	3,453.42

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SEARCHED FILED

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E. STALEY MANUFACTURING COMPANY 2200 ELDORADO STREET DECATUR ILLINOIS 62525 TELEPHONE 217/423-4411

March 2, 1974



Hon. Sylvester J. Ryan  
United States District Court  
United States Court House  
Bley Square  
New York, New York 10007

Re: Matter of American Express  
Warehousing, Ltd. - 63-B-1021

Dear Judge Ryan:

I am submitting this letter in opposition to the Petition of the Official Creditors Committee for an allowance out of the assets of the above estate for legal services rendered by members of the Committee and their law firms and in support of an application for the appointment by the Court of a special counsel to represent the estate and those creditors upon whom the financial burden of the allowance would fall.

The smaller creditors including my company are placed in a difficult position by the Committee's Petition. Ordinarily, the debtor in a Chapter XI proceeding or the creditors' committee, or both, would review claims against the estate and object to those of dubious validity. In this proceeding the Debtor has, I understand, no prospect of benefiting from making such objections because the allowed claims far exceed available assets and the claim is being asserted by members of the Official Creditors Committee themselves who cannot, of course, pass upon their own claim with objectivity.

While the amount of the allowance sought is large, almost \$300,000, the effect on individual creditors, such as Staley, with a small share in the estate is not great enough to warrant the retention of counsel by each creditor affected by the claim.

Hon. Sylvester J. Ryan

- 2 -

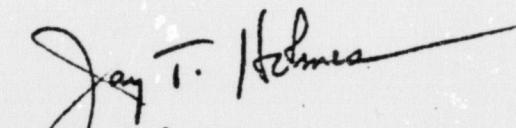
March 22, 1974

On their face the Petition and supporting papers would appear to raise serious questions. The Official Creditors Committee states that it retained its own members and their law firms, who were at the same time acting as lawyers for individual creditors. It says further that the lawyers did not undertake to represent the creditors from whom they now seek contribution, apparently reserving the right to prefer their own clients' interest in the event of a conflict. The allowance sought is said to be based on an allocation of fees by the law firms involved between their own clients and the creditor group as a whole.

Staley and, I understand, other creditors retained their own counsel to protect their interests in this proceeding and have expended substantial sums for legal expenses.

In view of the fact that the usual mechanism for the review of claims - scrutiny by the debtor and creditors committee - is not effective in the circumstances of this case, and in view of the problems raised by the Official Creditors Committee's purported retention of themselves and their own law firms and their simultaneous representation of their individual clients, the size of the allowance sought and the small shares of unrepresented creditors making individual objections impracticable, special counsel should be appointed by the Court to represent all creditors adversely affected by the proposed allowance.

Sincerely,



Jay T. Holmes  
Director  
Law Division

skl

cc: Official Creditors Committee  
American Express Warehousing, Ltd.  
One Chase Manhattan Plaza  
New York, New York 10005

Cadwalader Wickersham & Taft  
One Wall Street  
New York, New York 10005

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 IN THE MATTER :

5 of :

6 AMERICAN EXPRESS WAREHOUSING, LTD., : 63-B-1021

7 Debtor. :

8 - - - - - x

9 March 28, 1974,  
10 11 A.M.

11 Before:

12 Hon. Sylvester J. Ryan,  
13 District Judge.

14 Appearances:

15 CADWALADER, WICKERSHAM & TAFT, ESQS.,  
16 Attorneys for Debtor,

By: Jacqueline A. Swords, Esq.,  
John J. Walsh, Esq., and  
Earl Nemser, Esq., of Counsel.

17 HANNOCH, WEISMAN, STERN & BESSER, ESQS.,  
18 Special counsel for the Debtor,  
By: James J. Sharger, Esq., of Counsel.

19 DR. ABRAHAM FEINSTEIN  
20 For Amertrade Inc.

21 DUNNINGTON, BARTHLOW & MILLER, ESQS.,  
22 For Scarburgh Company, Inc.,

By: Richard Ernest Rieder, Esq.,  
Charles L. Stewart, Esq., and  
Rigdon Boykin, Esq., of Counsel.

23 \* \* \* \* \*

24

25

\* \* \* \* \*

19 THE COURT: Now, the next one we are going to  
20 take up --

21 MR. SWORDS: Would be the application by the  
b3 22 Official Creditors Committee, your Honor.

23 MR. HARTFIELD: If it please the Court, I first  
24 would like to say that it has been my pleasure to have  
25 spent the last ten years with your Honor in this matter,

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2 and on behalf of the members of the committee, and I  
3 think on behalf of all the creditors, whether or not they  
4 agree or disagree with our application, we want to say  
5 to the Court that we appreciate the kind of help the Court  
6 gave in this situation, and to say that we could not have  
7 done what we have done -- and we think we have done a  
8 good job -- but for the good and welfare meetings and the  
9 guidance and pleasant helpful things that the Court has  
10 done in order to get this plan going and confirmed.

11 THE COURT: Thank you very much, Mr. Hartfield.  
12 It did take a few years, but in view of the magnitude of  
13 the problems that were presented, it was wound up a lot  
14 quicker than most of you anticipated and with good results.  
15 That was due to the cooperation of all engaged here in  
16 this matter, of all counsel and of all parties, each one  
17 taking care of his own interest, and yet trying to cooperate  
18 to the end so that justice would be done and the matter  
19 speedily terminated.

20 MR. HARTFIELD: I think it would waste everybody's  
21 time if I described what has gone on here or what the  
22 role of the OCC has been. I would only like to touch on  
23 a few high spots which relate to the legal question which  
24 is presented to your Honor. I do not think the amounts  
25 involved are under question in the affidavit that I showed

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13

2 and presented the Court with this morning.

3 You will see that some 4,000 hours were spent  
4 by the committee members, who seek \$748,000, and I am  
5 pleased to say that is less per hour than Mr. Swords'  
6 charges.7 THE COURT: Well, it would cost a good deal more  
8 today.

9 MR. HARTFIELD: Yes.

10 THE COURT: We all know the expense of operating  
11 a law office and living and rent, help in your office,  
12 has just gone mountain high. I don't know how anybody  
13 can maintain and operate an office today and have anything  
14 left for his own living, his own salary, even. It is  
15 just impossible.

16 MR. HARTFIELD: It is hard.

17 Now, this application is a little different  
18 from most applications, as this bankruptcy was a little  
19 different from most bankruptcies. We are asking the estate  
20 to reimburse those creditors who have already paid for  
21 the time, the legal services of the committee.22 A little of the history is important for record  
23 purposes now. When this committee was an informal committee  
24 there was a large meeting of the creditors at the Chase  
25 Manhattan Bank in a kind of auditorium. It was pointed out

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2 by me that if we were to be appointed by the court as  
3 an official creditors committee there would be hugh legal  
4 expenses involved, and that the only way we thought any-  
5 thing could ever be done in this matter, and done appro-  
6 priately, was to have the creditors pay the expenses  
7 of the members of the OCC for the legal services they  
8 were to perform.

9 In substantial part that was agreed to, and  
10 the problem came about as to how the creditors should  
11 contribute to that. It was suggested by me, since there  
12 was no other yardstick available, that the face amount of  
13 receipts, good or bad, should be the prorata basis on  
14 which creditors should contribute, and most of the creditors  
15 did contribute, so that the firms who did the legal ser-  
16 vices set forth in my affidavit here have all been paid  
17 by those creditors on that basis, which was arbitrary  
18 and not fair, but the only one we could think of at that  
19 particular time.

20 There are some exceptions to that. My firm  
21 was owed some small amount of money in this matter, which  
22 has not been paid at all. I think it is some fifteen-odd  
23 thousand dollars. And there are a few odds and ends like  
24 that.

25 By and large, what we are saying to the Court is

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2 the estate at this juncture -- and we have always told  
3 the Court that we would make this application some day --  
4 should rectify and redistribute, in effect, the fees which  
5 have been paid on that arbitrary basis for the legal  
6 services of the committee. Creditors have paid.  
7 They were most of the creditors, I think, some 95 per cent  
8 of them did contribute, or something like that. In many  
9 instances they have paid amounts that they should not  
10 have had to pay. Many creditors have been benefited whereas  
11 they should not have been so benefited. And so what we  
12 are asking is that the estate reimburse us for our services,  
13 and we will then immediately turn around and reimburse  
14 those who have already paid for their services, with the  
15 exception of that small amount that I mentioned to you.

16 THE COURT: How much would that be? What would  
17 that reimbursement amount to?

18 MR. HARTFIELD: My affidavit says \$748,635, and  
19 I have not included the fees of the secretary, which I  
20 believe to be quite reasonable, for which he is requesting  
21 I believe, \$50,000.

22 In so doing the estate will have paid in a  
23 more fair way for what has already happened, will have  
24 arranged more fairly to pay the legal fees where they  
25 should justly lie.

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2 This application is made by the credit committee.  
3 There is at least one member of the creditors committee,  
4 maybe two, who does not agree with the majority of the  
5 committee in making this application, and that is because  
6 their particular clients have not come out as well as  
7 certain other clients in the bankruptcy, and they would  
8 like to get the last penny in the matter. I cannot criti-  
9 cize them for their objection.

10 I say that as a matter of law the committee is  
11 entitled to what it is asking the court.

12 THE COURT: Who are those two creditors? Are  
13 they here?

14 MR. HARTFIELD: Scarburgh is one and Dr. Feinstein  
15 is another, and your Honor tells me about Staley. I  
16 didn't get a copy of Staley's objection.

17 THE COURT: Well, I got a letter here signed  
18 by somebody.

19 MR. HARTFIELD: I don't quite understand Staley,  
20 because somebody told me today they would come out a  
21 hundred per cent in due course. I may be wrong on that.  
22 I don't want to make that representation. We do have the  
23 problem of Scarburgh and Feinstein.

24 THE COURT: Dr. Feinstein has been here in the  
25 past and has cooperated on many occasions. At times he

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2 has objected. After he has investigated and checked, he  
3 has helped and assisted as much as he could, indeed, and  
4 his objections were finally resolved to the satisfaction  
5 of himself and his client.

6 Isn't that so, Doctor? Am I correct in my  
7 recollection?

8 MR. FEINSTEIN: Yes. I started before this  
9 committee was formed to help, to make some settlement,  
10 and I was the first to make a memorandum to Dr. Clark,  
11 to show him that it is in the interest of his firm to  
12 make a settlement, and later came this committee into  
13 existence. I never agreed that it be a committee of  
14 lawyers which represented only the big creditors and the  
15 big exporters and the banks. I objected. I proposed to  
16 make a committee, to elect a committee of three lawyers  
17 and three business people. But my votes did not count  
18 because I was a debtor to the Chase Bank, and the repre-  
19 sentative of the Chase Bank voted against me.

20 This committee has done an excellent job because  
21 most of their clients have gotten not only the capital  
22 back, what they had lost, but they even got interest, and  
23 a firm like mine still is minus near a million dollars,  
24 and some of the creditors died financially, went into  
25 bankruptcy. So I have seen all these losses.

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2 Until about two years ago I couldn't do anything,  
3 because all my receipts were pledged to the Chase Bank,  
4 and the Chase Bank did what they had to do in their  
5 interest, and it was not always in my interest, it was  
6 in their interest.

7 I must say that they advised me from the beginning  
8 to let my firm go in Chapter XI, and since I didn't do  
9 it, I even two years ago when I could make a settlement,  
10 I borrowed from a friend a few hundred thousand dollars  
11 in order to pay them interest of \$215,000.

12 Today I am objecting against the relief sought  
13 by the petitioner because they have done an excellent job,  
14 but for their clients. How can I pay expenses which were  
15 done to make the agreement with Amex in such a way that  
16 they had advantages, that they are already today satisfied  
17 with interest and expenses, and I, I am alive, and for this  
18 I have to thank the court, because, otherwise, I would not  
19 be alive financially, but I am alive financially, I am  
20 satisfied, I paid all my debts with interest. I even  
21 appreciate that the Chase Bank made the settlement with  
22 me, and they could have asked from me about \$400,000  
23 interest and I paid only \$215,000, so I am happy, but  
24 I would consider any amounts which were given by these  
25 big creditors to the lawyers to divide this amount into

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2 say, this is for this and this is for this. The six  
3 lawyers are the best lawyers in the country, and they  
4 proved it in this case, but not for me. For me they have  
5 done a job, because they had done for their clients such  
6 a good job that I am financially today poor, entirely poor,  
7 but I am still happy.

8 I can prove that several actions that were done  
9 in this matter were detrimental of the small creditors,  
10 and of creditors like my firm is.

11 THE COURT: Hadn't you subordinated all your claims  
12 to the Chase Bank?

13 MR. FEINSTEIN: They subordinated my claim?

14 THE COURT: Hadn't you pledged any claim you  
15 had against the debtor and against anybody else to the  
16 Chase Bank?

17 MR. FEINSTEIN: No, I have not. I have no claims  
18 against anybody. But I paid everybody with interest. I  
19 gave everything to the Chase Bank, because I didn't want  
20 to go in Chapter XI. I have to give them all the collateral  
21 I could. I started even to pay monthly, and later I  
22 borrowed money from friends in order to satisfy the Chase  
23 Bank.

24 But here I would consider if the Court would  
25 approve any amounts which, for instance, the Chase Bank

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2 or the Continental Bank gave to their lawyers money,  
3 and that today, which is a little resrve of \$2,000,000,  
4 which I think I have written privately about to your Honor,  
5 about two years ago, why they were not distributed, and  
6 the answer came later from Mr. Swords that it will be  
7 in this year, '73, later distributed.

8 I have written again, I have intervened. Today  
9 it is money which I still would like to get out of this  
10 reserve, something which I can live maybe a few years.  
11 I am 81 years old, and my firm is in liquidation. Nobody  
12 can say that my firm didn't pay everything with interest  
13 to everybody.

14 And as for my children, one of my sons was  
15 in the firm. He went out because we don't have money.  
16 He went into teaching. He is teaching at the university.

17 The other, from the beginning didn't want to  
18 be a businessman, and especially he didn't like some matters.

19 I, personally, have seen a lot of things. I  
20 wanted to protest, to object, but I didn't have the money.  
21 I couldn't do anything.

22 THE COURT: The activities of the Official  
23 Creditors Committee were never made a secret. It was  
24 disclosed to everybody. You were fully informed of what  
25 happened.

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2 MR. FEINSTEIN: No, it was a secret. For instance,  
3 they did not accept the first proposal from Amex.

4 THE COURT: There was nothing secret about that.

5 MR. FEINSTEIN: But I protested.

6 The second was bad for me, because the second  
7 agreement allowed for the payment for the so-called  
8 forgeries, which reduced my compensation, and I could do  
9 nothing because the creditors of these falsifications,  
10 about \$38,000,000, were Continental, and the representative  
11 from Continental is Mr. Hartfield, and the second falsi-  
12 fication is the Chase Bank, and they also were on the  
13 committee. They didn't ask me. They went and said don't  
14 accept the first proposal. And I would blame the com-  
15 mittee that they did not negotiate that first proposal.

16 THE COURT: Will you listen to me for a moment,  
17 please. Do you desire to submit any additional papers,  
18 other than those you already submitted?

19 MR. FEINSTEIN: If it is necessary.

20 THE COURT: I don't know whether it is necessary  
21 or not. I can't be your attorney. I ask you whether or  
22 not you desire to submit any additional evidence of any  
23 kind whatsoever.

24 MR. FEINSTEIN: I have here a copy just what  
25 I told now to the court. If it is necessary to ask me for

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2 any evidence, I am prepared to do it.

3 THE COURT: I am not asking you for any evidence;  
4 I am asking you, do you want me to hear any further evidence  
5 other than what you have submitted.6 MR. FEINSTEIN: This is again a question which  
7 it is difficult for me to answer, because for me to get  
8 the balance of this part of the reserve is life and death,  
9 and that you will understand.10 THE COURT: I really don't know what your ob-  
11 jection is. I am trying to find out. Have you an attorney  
12 here today representing you?13 MR. FEINSTEIN: I don't have an attorney because  
14 I don't have money to pay for one, and my attorney was  
15 Mr. Kaufman, and he is very sick. He would have come without  
16 money to represent me.17 THE COURT: As I remember it, in the past we  
18 have had the same situation. Mr. Kaufman didn't appear,  
19 and one time you asked for an adjournment because Mr.  
20 Kaufman was sick and he said he would be here. He never  
21 came here.22 Have you any attorney here today that you  
23 want to speak for you and on your behalf?24 MR. FEINSTEIN: I cannot ask anybody to come  
25 and say, "I want to represent you."

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2 THE COURT: You have nobody?

3 MR. FEINSTEIN: I don't have anybody.

4 THE COURT: Now, then, have you any other papers  
5 that you desire to submit?6 MR. FEINSTEIN: Only if the Court will see that  
7 from this point it is necessary.

8 THE COURT: What point?

9 MR. FEINSTEIN: I want to read it to you. I  
10 say that I object.11 THE COURT: You are reading now from a piece of  
12 paper?

13 MR. FEINSTEIN: Yes.

14 THE COURT: Do you want to offer that in evidence  
15 on this record now?16 MR. FEINSTEIN: Yes, and if you consider that  
17 there is any point which you need explanation on, I am  
18 prepared to do it.19 THE COURT: Give me the paper then. I am going  
20 to mark it in evidence. We will have photostats made of  
21 that.22 MR. HARTFIELD: If I may continue, your Honor.  
23 I really forgot where I was --24 THE COURT: I don't know where we are at yet,  
25 because I have not seen the paper.

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1 (Paper marked Objector's Exhibit 1 and is  
2

3 as follows:

4 "UNITED STATES DISTRICT COURT

5 SOUTHERN DISTRICT OF NEW YORK

6 IN THE MATTER OF: IN PROCEEDINGS FOR AN  
7 AMERICAN EXPRESS WAREHOUSING, LTD. -ARRANGEMENT-  
NO. 63-B-1021

8 RE: NOTICE OF HEARING ON  
9 PETITION FOR ALLOWANCES  
TO THE OFFICIAL CREDITORS COMMITTEE

10 HONORABLE SYLVESTER J. RYAN

11 JUDGE OF THE UNITED STATES

12 I, Dr. Abraham Feinstein, President of  
13 Amertrade, Inc., object to the relief sought by the  
14 Petitioners herein on the ground that all such petitioners  
15 were and still are primarily acting on behalf of their  
16 own individual clients and not, in reality, on behalf of  
17 all other Creditors of the Debtor.

18 In addition, if the Court should determine that  
19 any of such petitioners should be paid any amounts, such  
20 payments should be allocated, not pro-ratio to the respective  
21 claims of the creditors on the remaining funds, but rather,  
22 pro-ratio to the original claims of all creditors against  
23 the debtor.

24 Furthermore, I respectfully ask the Court to  
25 ask the distribution of all the money available without delay

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2 "New York March 28, 1974 Respectfully submitted  
3  
4 AMERTRADE, INC.

5 Dr. A. Feinstein, President.")

6 b6 5 MR. HARTFIELD: All that I would like to say  
7 in answer to the good doctor is that some of the major  
8 creditors, including the Continental Bank, which is mine,  
9 have not come out whole and are minus millions of dollars,  
10 nonetheless. And, therefore, I would hope the doctor would  
11 consider that this committee has done everything possible  
12 to get the maximum amount of money for everybody, including  
the good doctor.

13 May I return to the argument on the law?

14 THE COURT: Before you do that, I should like  
15 to make a statement for the record of my own observation  
16 of the committee on this matter, in that they performed  
17 their work in an entirely proper way and fulfilled their  
18 obligations to everybody.

19 MR. HARTFIELD: Well, we did our very best and  
20 this was very complicated, and in order to do what we did,  
21 we had to utilize the staffs of five or six of the major  
22 law firms.

23 THE COURT: I don't see anything wrong in that.

24 MR. HARTFIELD: That is what we are asking to  
25 be compensated for.

1 munh

2 THE COURT: You should be paid and compensated  
3 for that, because no lawyer and no law firm should finance  
4 his client's litigation; you shouldn't be expected to  
5 do so and shouldn't be allowed to do so.

6 MR. HARTFIELD: Your Honor will also remember  
7 the lawyers on the committee were paid by their clients  
8 for work which was attributable to those clients, and I  
9 can assure you that I and every member of the committee  
10 leaned backwards to be certain that the legal work was  
11 charged first to the client, and only when it was clearly  
12 legal work attributable to the committee did we make the  
13 charge to the committee.

14 Objection has been made by one of the creditors,  
15 Scarborough, relying largely on a case in '41. I can't  
16 say it is an old case, because I was around then, but it is  
17 no longer, I think, the law. It has practically expired.  
18 It related to a non-official committee, instead of an  
19 official creditors committee. It was a case interpreting  
20 provisions prior to the passage of the Chandler Act. It  
21 has been the subject of judicial attrition over the  
22 years; it has been recently the subject of attrition in  
23 the last week or two in this court in the Sapphire case.  
24 It just is not in point, as I think your Honor will find  
25 upon reading the memorandum submitted by the committee,

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2 and that is the law relied upon by the attorneys in  
3 Scarburgh.

4 THE COURT: I read the memorandum submitted  
5 by the committee and I agree with the points made therein.

6 MR. HARTFIELD: In our memorandum, page 2, the  
7 last sentence on the page, I make an accurate statement,  
8 but perhaps I should have stated something else not to  
9 make it misleading, so the Court will know -- Scarburgh  
10 not only contributed a thousand dollars, but its banks  
11 did contribute several hundred thousand dollars to this  
12 committeds work which we are asking your Honor to make  
13 an order on so that it can be appropriately charged to  
14 the appropriate people. Thank you, sir.

15 THE COURT: Does anybody else wish to be heard  
16 in this matter at all?

17 MR. RIEDER: I wish to be heard for Scarburgh  
18 if the creditors committee has finished its presentation.

19 Your Honor, I feel so much like an Arab sheik  
20 in a gas line.

21 THE COURT: It all depends on where the gas line  
22 is.

23 MR. RIEDER: I am only familiar with those  
24 in this jurisdiction.

25 THE COURT: I don't know just what your complaint

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2 could be here.

3 MR. RIEDER: I will try to set it forth to you.

4 THE COURT: You represent a very substantial  
5 creditor.6 MR. RIEDER: Who, unfortunately, has not obtained  
7 what he would like to obtain, and that is why we are here.8 Let me tell you what the situation here is on  
9 the law. With all due respect to Mr. Hartfield, he is wrong  
10 on the law.11 The law provides -- and it is clear as the day  
12 is long, that members of a creditors committee cannot be  
13 paid out of funds of the debtor. And as far as the case  
14 which we rely upon is concerned, it states that speci-  
15 fically, that creditor committee members cannot be paid  
16 out of the funds of the debtor. That case has been upheld  
17 in the Second Circuit.18 THE COURT: They were not paid out of the funds  
19 of the debtor.20 MR. RIEDER: They are seeking to be paid at  
21 the present out of the funds of the debtor, and that is  
22 all we object to.23 THE COURT: Their clients are seeking reimbursement  
24 for what they paid out of their pockets.

25 MR. RIEDER: They are seeking it from the

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2       funds of the debtor.

3           THE COURT: They are funds due to their clients,  
4       in any event.

5           MR. RIEDER: We would like them to be paid  
6       under the plan, and not in this subterfuge as payment  
7       for expenses which are not compensable.

8           THE COURT: When you speak of subterfuge, you  
9       speak of something that you claim is done surreptitiously  
10      and not disclosed.

11          MR. RIEDER: No, your Honor, I don't think so.

b7

12          THE COURT: Well, I am saying that is my view  
13      of the word "subterfuge," and in this case there was  
14      nothing concealed, no subterfuge here at all.

15          MR. RIEDER: Your Honor, there was nothing con-  
16      cealed but creditors contributed money and paid their  
17      attorneys. There was no agreement, however, among the  
18      creditors that that money would be paid back to them as  
19      such out of the funds of the debtor.

20          THE COURT: Well, they were not funds of the  
21      debtor, they were funds of the people who were creditors  
22      as well.

23          MR. RIEDER: That is right, but now they are  
24      seeking them from the debtor, and there is no provision  
25      in law for the payment of such.

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2 THE COURT: I don't think they are seeking them  
3 from the debtor at all.

4 MR. RIEDER: Where else would they be coming from?

5 THE COURT: What would happen to the money if  
6 they were not paid back?

7 MR. RIEDER: It would be distributed in accordance  
8 with the provisions of the plan, as it should be.

9 THE COURT: Who would get it then?

10 MR. RIEDER: Some of the creditors, but it would  
11 not be distributed in the same amounts to certain creditors,  
12 as they are seeking.

13 THE COURT: I don't agree with that.

14 MR. RIEDER: Your Honor, the provisions of the  
15 plan at the present time do not provide for payment in  
16 certain percentages in accordance with the contributions  
17 the creditors have made; the payments would be different.  
18 And, basically, that is what the bankruptcy law is set up  
19 to do, your Honor, it is set up to pay not the expenses  
20 of the creditors in arriving at a plan, but to pay the  
21 principal amount of the loss. That is what we are asking,  
22 that the principal amount of the loss be paid to the extent  
23 that the plan provides for it, and that these funds go  
24 through the plan, not outside of the plan, which is what  
25 these men are asking for. The fairest way is to have them

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2 go through the plan, otherwise-- and I do support the  
3 doctor's objection here -- the money goes mostly to the  
4 large creditors, a preference to the large creditors who  
5 made up the creditors committee; it does not go in  
6 accordance with the plan. That is all we are asking.  
7 The law provides for it to go in accordance with the plan.

8 I can read you the cases, if it should make  
9 any difference. But as the Second Circuit has said --

10 THE COURT: You may read any cases you want to,  
11 or give me any paper that you want to submit.

12 MR. RIEDER: I have given you our papers. The  
13 cases are set forth in our brief.

14 THE COURT: I have your papers.

15 MR. RIEDER: Let me emphasize the case of Lane,  
16 and I know it has not been touched whatsoever by any  
17 recent decisions or statutes in respect to a creditors  
18 committee officially elected. With respect to an unofficial  
19 committee, there is some attrition in Lane.

20 As Mr. Hartfield points out, he is asking only  
21 for payment of the official creditors committee, and the  
22 Lane case is solid law, that any expenses "certainly cannot  
23 include any form of compensation to committee members  
24 themselves, whether as agents or solicitors of agents  
25 or otherwise. Further, no allowance should be made to any

2 agents so far as they either perform tasks within the  
3 compass of the committee's own duty or act for the debtor,  
4 as in the active solicitation of assents to the proffered  
5 plan."

6 That is still the law today, and it absolutely  
7 prohibits the payments of these fees.

8 As far as our client is concerned, Scarburgh,  
9 I think it is in a unique position. Scarburgh has not  
10 been fully paid in this situation. It has creditor banks  
11 which have nearly been paid out. Those creditor banks  
12 contributed money. What they want now is to get back  
13 the money they contributed to the expenses, and then  
14 seek the rest of their principal debt from Scarburgh.  
15 Scarburgh's position is that the funds of the debtor should  
16 go to pay Scarburgh's principal debt through the plan.  
17 That is what we are asking for. I respectfully submit,  
18 your Honor, that that is what the law provides.

19 MR. HARTFIELD: Your Honor, I would like to  
20 say one thing in closing. My friend from Scarburgh has  
21 neglected -- and I am sure unintentionally -- to point  
22 out that the 1941 Lan case dealt with an informal creditors  
23 committee, not an official creditors committee, and in  
24 those days, your Honor, you and I will both remember  
25 that there was a scandal involved with bankruptcy committees

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2 being formed ad hoc which had no status. The case has  
3 nothing to do with the price of beans.

4 MR. RIEDER: Your Honor, I don't want to engage  
5 in a debate with Mr. Hartfield, but the case involved two  
6 committees, an unofficial committee and an official  
7 committee, and as far as the official committee is concerned  
8 it has recently been upheld here in the Southern District  
9 in a number of cases, one of which is Plastikwear, which  
10 was decided in 1954, and it states, "Mr. Lewis and Mr.  
11 Friedman, having been members of the official creditors  
12 committee when their services were rendered are not entitled  
13 to payment of any compensation for such services. Unless  
14 and until our Circuit Court excludes attorneys from the  
15 broad prohibition announced by it in the cited cases,  
16 including Lane, referees and district courts are constrained  
17 to apply it literally."

18 That is the law today. It has not been changed.

19 MR. FEINSTEIN: Your Honor, I think it would be  
20 advisable if I would read the second paragraph of what I  
21 wanted to say:

22 "In addition, if the court should determine  
23 that any of such petitioners should be paid any amounts,  
24 such payments should be allocated, not pro-ratio to the  
25 respective claims of the creditors on the remaining funds,

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2 but, rather, pro-ratio to the original claims of all  
3 creditors against the debtor."

4 For example, we in the additional pool bought  
5 something like 4 per cent through the good, excellent  
6 actions of the committee. We are getting now about 6 per  
7 cent from this reserve, because we still have to get about  
8 800 or 900 thousand dollars. So if they will get now  
9 this money, I will part the part which, for instance,  
10 Continental Grain has paid in, or Peters, or all these  
11 big creditors. So I am asking in my memorandum to you  
12 as I have, because I cannot appeal, I have no money. I  
13 rely only on your judgment. I ask you to order that the  
14 payment should be for about 4 per cent, and not 6 per cent,  
15 for then a firm like Peters will pay nothing. I think  
16 I mentioned it, and I think this is only a matter of mathe-  
17 matics, which is not a question, not a problem, which I  
18 think also the committee will understand.

19 THE COURT: Is there anything else you would like  
20 to say?

21 MR. FEINSTEIN: I would like to add that if the  
22 other smaller creditors would not be in debt you would  
23 have had here about at least 15, and not 1. Why did  
24 they die? Because the committee was excellent in their  
25 work.

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2 THE COURT: Do you have a letter from A.E.  
3 Staley Manufacturing Company under date of March 27, 1974?

4 MR. RIEDER: Are you referring to me? What was  
5 the date of the letter?

6 THE COURT: March 22, 1974? It just came in.

7 MR. RIEDER: No, sir, your Honor, I don't have it.

8 THE COURT: Do you want to read this? Particularly  
9 I want to call attention to the last paragraph of that  
10 letter in which they make the suggestion that "special  
11 counsel should be appointed by the Court to represent all  
12 creditors adversely affected by the proposed allowance."

13 Is there anybody here on behalf of Staley?  
14 Apparently nobody is here. I see absolutely no need to  
15 appoint special counsel.

16 MR. SWORDS: If your Honor please, on behalf of  
17 the debtor and in the interest of preserving what remains  
18 of its estate, it seems to me, your Honor, that the other  
19 group of creditors are already amply represented.

20 THE COURT: I think so. That is my opinion, more  
21 than amply represented and have been throughout the entire  
22 proceeding.

23 MR. RIEDER: With respect to this letter, I  
24 say to your Honor that we represent Scarburgh. We feel  
25 that there are many small creditors, as the doctor who

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2 pointed out, who would suffer through this proposed payment  
3 of fees. But as far as appointing special counsel for them,  
4 we would leave that to your discretion.

5 THE COURT: Well, I am not going to appoint  
6 any special counsel. There is no occasion for it, no need  
7 for it.

8 Is there anything else you want to say?

9 MR. RIEDER: No, sir.

10 THE COURT: Anything else you want to say, Mr.  
11 Hartfield?

12 MR. HARTFIELD: No, sir.

13 THE COURT: Does anybody else want to be heard?

14 I agree with the position of Mr. Hartfield; I  
15 don't agree with your interpretation of the law.

16 MR. RIEDER: We will wait for your decision to  
17 come down and take it into consideration then. Thank you.

18 THE COURT: Does anybody else wish to be heard?  
19 If not, submit your proposed orders as I outlined.

20 Thank you.

21 ---  
22  
23  
24  
25

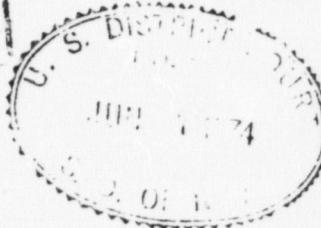
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

AMERICAN EXPRESS WAREHOUSING, LTD.,

MEMORANDUM OPINION  
63 B 1021

Debtor.

# 40787

RYAN, J.:

The Official Creditors' Committee (OCC) elected on January 28, 1964, through its Chairman, has petitioned for "an allowance for its services and disbursements from January 28, 1964 to date", as well as for an allowance for its Secretary and Acting Secretary in a sum totalling together \$897,818.42.

It appears that, of that sum of \$897,818.42, \$807,920.84 has heretofore been paid directly to OCC and its non-member law firm by creditors whom they represented on the OCC, leaving a balance of \$91,656.37 allegedly still due the OCC. If OCC's petition is allowed, the \$807,920.84 would be paid over to the creditors represented by these "lawyer-members" as "reimbursement", and the balance of \$91,656.37 would be retained by the OCC lawyer-members and the OCC "Secretaries" in the amounts of \$41,655.37 and \$50,000 respectively.

The justification for the payment of this sum as administration expenses out of the \$2,000,000 Fund remaining in the Debtor's Estate is said to be an agreement made between the lawyer-members and the creditors they

represented in a private capacity as their attorneys under which the lawyer-members agreed to serve on the Creditors' Committee, only <sup>on</sup> condition that they be paid by the creditors as they went along. This agreement was accepted by some of the creditors - the largest of them - and, true to their word, they have already paid these lawyer-members the sum of \$807,980.84, for which they now seek to be reimbursed.

The Committee was composed of the following:

<u>COMMITTEE MEMBER</u>	<u>LAW FIRM</u>	<u>Representing</u> <u>CLINICS</u>
David Hartfield, Jr. (Chairman)	White & Case	Continental Illinois National Bank and Trust Company of Chicago
Thomas Daly	Lord, Day & Lord	Scarburgh Co. John D. Staren Co.
Lloyd K. Garrison	Paul Weiss, Rifkind, Wharton & Garrison	Continental Grain Company Keyser Ullman, Limited
Roy C. Huberkern, Jr.	Milbank, Tweed, Hadley & McCloy	Chase Manhattan Bank
Donald Marks	Baer & Marks	J.R. Williston & Sons, Inc.
William Curtis Pierce	Sullivan & Cromwell	Marine Midland Grace Trust Company of New York J. Henry Schroder Banking Corp Hanko Products Ralph H. Peters
<u>Secretary</u> Hamilton G. Kenner Murray H. Warschauer (General Counsel, Dunjo Corporation, and officer)	Dewey, Ballantine, Bushby, Palmer & Wood	Dunjo Corporation

The petition recites that the OCC "concluded that it would be necessary and wasteful to retain outside counsel since each of the members

of the OCC had at his disposal the staff of his law firm and it was members of these staff who were organized in the investigating team to dig out the facts and study the various legal problems which were presented as a result of this work." From the recital of the work performed by each of the lawyer-members and their respective law firms, it is quite clear that the CCC performed legal as well as the normal services performed by creditors' committees. (Section 739(1), Title 11, U.S.C.) It is also quite clear that by this petition the lawyer-members seek reimbursement of legal fees charged by them as lawyer-members of the OCC for their services, and paid for by their clients. For obvious reasons, nowhere in the petition is it averred that the creditors, who agreed to pay the fees of the lawyer-members of the OCC who were also their private attorneys, would do so on condition that they be reimbursed from the Bankrupt Estate. Certainly, no order to that effect was or ever could have been obtained from the Court.

After many years of litigation and negotiations by the OCC and various counsel, the Plan of Arrangement of the Debtor was confirmed and became final on June 13, 1967. Some distributions were made, leaving a balance of approximately \$2,000,000 to be distributed after payment of administrative expenses.

There were three objecting creditors to the petition herein: Scarborough, the largest creditor of the Debtor, originally represented on the OCC by Lord, Day and Lord and now by substitute attorneys; and Staloy Manufacturing Co. and Amertrade, Inc., two small creditors. Their common

objection is that, by the petition, counsel (lawyer-members) are in effect protecting their clients' interests rather than all the creditors' interests by seeking to reimburse these clients for legal fees paid by the latter to them, thus, in effect, violating the provisions of the P.L. and giving these large creditors a preferential payment before final distribution under the plan. They also object on the ground that the other creditors have borne the expense of their own legal counsel and that it is unfair to compel them to contribute to the payment of the legal fees of the largest creditors.

Staley Manufacturing Co. suggests that the Court appoint counsel to represent objecting creditors whose interests in the Fund are too small to warrant the retention of individual counsel to protect their rights in the matter.

A hearing on the petition was held by me on March 28, 1974 and, after further considerable study and examination of the statutes and authorities cited by both sides, I conclude as follows:

First, the petition to appoint counsel for objecting creditors is denied at this time as not being necessary in view of the decision of the Court and in the interests of economy. If, at a later time, it should develop that the rights of the small objecting creditors cannot be adequately protected by the Court, the application may be renewed.

Second, the petition by the OCC for reimbursement of and payment of the balance of fees for services rendered by them to the OCC - whether as lawyer-members or as attorneys for their own individual client creditors - is denied.

While it seems clear in this circuit that creditors may elect their respective attorneys to serve on the Creditors' Committee (Berry Dairy v. Chaco Superior, C.A.N.Y. 1941, 116 F. 2d 573), there is no statutory authority to pay them fees as such members. Section 737(2), Title 11, U.S. C. (formerly Section 337(2), 339(2)), provides that, after the acceptance of the arrangement the Debtor shall deposit money necessary to pay the costs and expenses of the proceeding; Section 739(2) provides that the Committee may employ such agents, attorneys and accountants as may be necessary to assist in the performance of its functions. Nowhere is there authorization for payment of fees as administrative expenses to the members of the Committee qua members, and no case has held that they may be paid, even as attorneys. Lea e v. Maytian Corporation of America, 117 F. 2d 216 (2nd Cir., 1941), cert. denied, 212 U.S. 500; In re Realty Associates Securities Corp., 69 F. 2d 41 (2nd Cir., 1934), cert. denied, 292 U.S. 623; In re Siegel, 252 F. 197 (S.D.N.Y., 1918), reversed on other grounds 253 F. 223 (2nd Cir., 1919); Hessberg v. Rockwell Baking Corporation, 173 F. 2d 554 (2nd Cir., 1940); In re National Knitwear Fashions, Inc., Lacy. 60251, Op. No. 20990, CCH Bankruptcy Reporter Trans for Binder 953,034 (D.C. N.Y. 1954). 8 Collier on Bankruptcy, q5.35[5], pp. 737, 738.

"Compensation in any form cannot be allowed to committee members themselves, whether as committee members, or as agents for the committee, or as solicitors for a committee agent or otherwise. But an allowance of compensation for services to attorneys, accountants, and other agents of the official committee, knowing they are not members of the committee, has been recognized as proper."

The holding in Jane, supra, could not be clearer. There, the debtors promised the creditors that, if the plan of arrangement were confirmed, they would pay the compensation and expenses and disbursements of the Creditors' Committee duly appointed by the Court, "whose expenses shall include the fees and disbursements of their respective attorneys and counsel." After confirmation of the plan, the official creditors' committee petitioned for an allowance for the services of Jane as secretary and Williams as attorney for the official creditors' committee, of which they were also members. The Court held that the allowable expenses of the official creditors' committee

"certainly cannot include any form of compensation to Committee members themselves, whether as agents or solicitors of agents or otherwise. Further, no allowance should be made to any agents so far as they either perform tasks within the compass of the Committee's own duty or act for the debtor, as in the active solicitation of assents to the proffered plan." (p. 221)

In Massberg, the Court reaffirmed the Jane holding:

"Massberg was a member of the creditors' committee..... As such, he is precluded from receiving compensation for his services under the ruling in our recent decision in Jane v. Hytian Corporation of America, 2 Cir., 117 F. 2d 216."

The facts in Plastikwear Fashions, Inc., are almost identical. The lawyers there, members of the Committee, sought compensation for legal services rendered to the Committee. Judge Sugarman, citing Jane and Massberg and Collier on Bankruptcy, 14th Ed., 565, nailed the issue:

"Mr. Lewis and Mr. Friedman(lawyers), having been members of the official creditors' committee when their services were rendered are not entitled to payment of any compensation for such services.

"Unless and until our Circuit Court excludes attorneys from the broad prohibition announced by it in the cited cases, referees and district courts are constrained to apply it literally."

Although Section 737 has been amended twice since In re, the rule remains unchanged. In re Casco Fisheries, Inc., 345 F. Supp. 1252 (SDNY, 1972) and Sapphire Steamship Lines, Inc., 67 B 252 (SDNY, 1974), cited by petitioners, have nothing to do with the question of fees to members of a Creditors' Committee. In re Casco, supra, pointed out that the amendment to Section 337(2) in an aborted arrangement did not allow counsel fees to the Creditors' Committee while allowing them to the debtor, and In re Sapphire had to do with the allowance of counsel fees to attorneys for creditors who had not been specifically retained under the General Bankruptcy Rules, not with fees to the members of the Creditors' Committee. One of the reasons advanced by the Court for allowing compensation to the attorneys was that there was no duplication of services and the services were such that the trustee could not reasonably be expected to perform - just the opposite of the situation here. Petitioners appear to recognize the impossibility of collecting payment for services as members of OCC, for they advance as a last minute argument that they are not seeking payment for themselves but for their law firms, of which they are members. In support of this, by a supplemental affidavit of its Chairman, the OCC now seek payment as attorney for legal services, which brings me to my third conclusion.

Third, under Section 739, the OCC might have retained the services of attorneys and accountants - and certainly this is one case where the necessity for such services would be implied. Although petitioner's affidavit

states that the OCC did not want to go to that expense, the fact remains that they did employ one non-member firm (although two of that firm's ~~firm's~~ were the secretaries), which has been paid by the creditors in full the sum of \$77,307. This firm is not now seeking additional counsel fees. To the extent that this firm rendered legal services to the OCC apart from the services it rendered a individual client-Dunge, the second largest creditor, and to the extent that it can apportion these services, the petition to reimburse the firm of Dewey, Ballantine is denied without prejudice to an application made by the firm itself, setting forth in detail the work performed, the hours spent by the partners or associates. Rule 16(g), General Bankruptcy Rules. This circuit has repeatedly required such proof.

In re Hudson & Manhattan Railroad Company, 339 F. 2d 114 (2nd Cir., 1964); In re Wal-Fold Co., 345 F. 2d 676 (2nd Cir., 1965); see City of Detroit v. Grinnell Corp., CA 2, March 13, 1974, #73-1211, 1420. While it may well be that the legal services rendered to the OCC by their six law firms contributed to the benefit of all creditors, they cannot be compensated as counsel for the OCC under Section 793(2) for the following reasons:

The Court cannot find and the OCC cannot show that the services of the non-member firm Dewey, Ballantine were not adequate to assist them in the performance of their functions, and that, for this purpose, they required the services of six additional law firms and two secretaries, a total of nine sets of attorneys.

The very reason advanced by the OCC for electing the lawyer-members

and their firms was to prevent unnecessary waste, which could hardly be the case if the estate were to compensate seven law firms in the amount of almost \$900,000. Moreover, compensation of counsel under the statute is to be fixed by the Court. The fact that it was fixed to go by the lawyer-members of the Committee and their creditor-clients, is a clear indication that the retention of the member law firms was a purely private fee arrangement for the protection of individual clients, which the creditors and their attorneys had every right to engage in so long as they sought no compensation from the estate. In re A.L. Patrick, Inc., 93 F. Supp. 137.

Finally, an allowance to the firms of the lawyer-members of the CCC would, in effect, be an allowance to the members of the Committee, for which there is no authority. As Judge Friendly so succinctly stated in U.S. Trust Co. v. Felt, 361 F. 2d 164 (1966), "The conduct of the bankruptcy proceedings not only should be right but must seem right." (p. 168)

Fourth, the application for the auditing fees of Arthur Andersen & Co., denominated "disbursements", is denied without prejudice to a renewal upon a proper showing with itemized details as to hours worked by a partner or associate, and the specific work performed for the CCC as distinguished from the individual client-creditors.

Fifth, while the retention of secretaries to the CCC is an allowable expense under Section 739, the secretaries must be just that, and their compensation must be limited to such clerical duties and not encompass counsel fees. Here, given the position occupied by these two secretaries,

- one "acting" as General Counsel to and an officer of the second largest creditor, and the other a member of the non-member law firm, it is difficult to conceive of their performing the clerical duties ordinarily performed such secretaries. In fact, that "joint" affidavit of these two attorney describes a great deal of lawyers' work being performed by them for the payment to them, also, appears to have been part of the private arrangement entered into between lawyer-members and their clients. However, since neither secretary was a lawyer member of the Committee and since the fees of a secretary are permitted by the statute and are obviously necessary, the application is denied without prejudice to its being renewed on a detailed and sworn statement of each secretary as to clerical services performed, hours worked, etc., for the OCC, with an explanation for the need of two such secretaries, particularly since, under disbursements, there is listed the sum of \$5,654.26 for "Clerical Help".

With respect to the other disbursements, aside from the auditing fees and disbursements, the application is denied without prejudice to renewal itemizing and relating them to the OCC specifically.

To recapitulate:

1. The application for reimbursement and payment of additional fees totalling \$692,037.26 to the members of the OCC is denied.
2. The application for reimbursement of the legal fees and disbursements in the sum of \$77,307.30 to the law firm of Dewey, Ballantine, Bush & Palmer & Wood; for reimbursement of auditing fees and disbursements to the

firm of Arthur Andersen & Company in the sum of \$45,210.93; for payment of \$50,000 to the Secretaries and for reimbursement and payment of disbursements incurred by the OCC only, is denied without prejudice to renewal upon a proper showing.

It is ordered that any applications be made by Order to Show Cause with proof of service on all creditors (In re Casco Fashions, Inc., supra); and that a copy of this decision be served on all creditors and interested parties, who have appeared in this proceeding.

Settle an order to this effect.

Dated: New York, New York  
June 6, 1974.

\_\_\_\_\_  
United States District Judge.

J 163a

CB

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, LTD., : No. 63-B-1021  
Debtor. : ORD [R]



At New York, New York in said district on the 28<sup>th</sup> day of June, 1974.

Upon the petition of the Official Creditors Committee of the debtor dated March 8, 1974 for a first and final allowance for the fees of its members in the amount of \$692,353.65 and the disbursements of said committee in the amount of \$32,938.51 plus the auditing fees of Arthur Andersen & Company in the amount of \$45,218.96; for a first and final allowance for the fees and disbursements of the firm of Dewey, Ballantine, Bushby, Palmer & Wood in the amount of \$77,307.30, a total of \$847,818.42; and for a first and final allowance for the Secretary and Acting Secretary of said committee in an amount of \$50,000; proof of due service upon all interested parties of notice of said petition and of a notice of a hearing thereon to be held before this Court on March 28, 1974 having been filed; and

A hearing upon said petition having been held on March 28, 1974 by this Court at which the Official Creditors Committee, by White & Case (David Hartfield, Jr., of Counsel) was heard in support thereof and Ameritrade, Inc., a creditor, by its President, Dr. Abraham Feinstein and Scarburgh Company, Inc., a creditor, by Dunnington, Bartholow & Miller (Richard E. Rieder, of Counsel) were heard in opposition thereto; and

A. E. Staley Manufacturing Company, a creditor, having communicated with the Court by a letter dated March 22, 1974 opposing said petition and requesting the appointment of counsel to represent those creditors whose interests in the Fund are too small to warrant the retention of individual counsel, which letter has been duly filed; and

The Court having considered the oral arguments, the prior proceedings herein and having read and filed the petition and the affidavit and supplemental affidavit of David Hartfield, Jr., sworn to March 7 and March 27, 1974, respectively, and the joint affidavit of Hamilton G. Kenner and Murray H. Warschauer, sworn to December 26 and 31, 1973, in support of said petition; and the affidavit of Richard E. Rieder, sworn to March 25, 1974, and the memorandum of Dr. Abraham Feinstein dated March 28, 1974, and the letter of A. E. Staley Manufacturing Company dated March 22, 1974, in opposition to said petition together with the memoranda of law submitted in support of and

in opposition to said petition; and upon a Memorandum Opinion dated June 6, 1974;

NOW, THEREFORE IT IS

ORDERED that the petition of Staley Manufacturing

Company to appoint counsel for objecting creditors is denied without prejudice to its renewal at a latter date if it should appear that the rights of such creditors are not adequately being protected by the Court; and it is further

ORDERED that the petition of the Official Creditors

Committee for a first and final allowance for the fees of its members in the amount of \$692,353.65 to and the same hereby is denied; and it is further

ORDERED that the petition of the Official Creditors Committee for a first and final allowance for the disbursements heretofore paid by its Members in the amount of \$32,938.51 be and the same hereby is denied, without prejudice to a renewal upon a proper showing; and it is further

ORDERED that the petition of the Official Creditors Committee for an allowance for the auditing fees and disbursements of the firm of Arthur Andersen & Company in the amount of \$45,218.96 be and the same hereby is denied without prejudice to a renewal upon a proper showing with itemized detail; and it is further

ORDERED that the petition of the Official Creditors Committee for an allowance for the legal fees and disbursements paid by said committee to the law firm of Dewey, Ballantine, Bushby, Palmer & Wood in the amount of \$77,307.30 be and the same hereby is denied without prejudice to an application by said firm setting forth the appropriate details, including the work performed and the hours spent by the partners and associates thereof; and it is further

ORDERED that the petition of the Official Creditors Committee for a first and final allowance for the fees of the Secretary and Acting Secretary of said committee in the amount of \$50,000 is denied without prejudice to renewal upon a detailed and sworn statement of each secretary as to the clerical services performed, the hours worked and the hourly rate charged; and it is further

*forfeited.*  
ORDERED that any applications consistent with this *3075*  
~~order~~ be made by Order to Show Cause with proof of service to all creditors and that a copy of the Memorandum Opinion of this Court dated June 6, 1974 be served on all creditors and interested parties who have appeared in this proceeding.

*John J. Regan*  
U.S.D.J.L

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, : No. 63-B-1021  
LTD., : ORDER TO SHOW CAUSE  
Debtor  
-----x

Upon the annexed Application and Affidavit of  
Richard E. Rieder, sworn to January 22, 1975, it is

ORDERED, that the creditors and interested parties  
listed on Exhibit A annexed hereto show cause before the  
Honorable Sylvester J. Ryan in Room , at the United  
States Courthouse, Foley Square, New York, New York, on  
1975, at A.M., or as soon thereafter as  
counsel can be heard, why an order should not be made herein,  
granting an allowance of \$39,544.00 to Dunnington, Bartholow &  
Miller as compensation for its services in successfully opposing  
the Petition of the Official Creditors Committee for an  
Allowance dated March 8, 1974; and it is further

J 168a

ORDERED that service of this order, the application and the affidavit of Richard E. Rieder by mail to the creditors and interested parties listed on Exhibit A annexed hereto on or before 1975, shall be deemed sufficient service of this order.

Dated: New York, New York  
January , 1975

U.S.D.J.

EXHIBIT A ANNEXED TO THE ORDER OF THE C.J.C.

Omitted as unnecessary.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, : No. 63-B-1021  
LTD., : Debtor : AFFIDAVIT  
: :  
-----X

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK)

RICHARD E. RIEDER, being duly sworn, deposes and

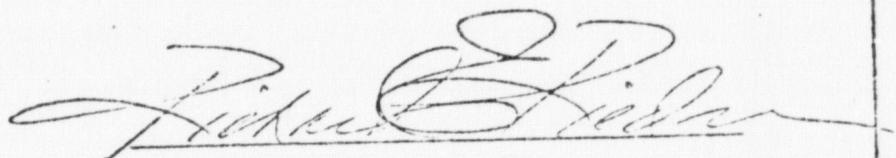
says:

1. I am a partner in the firm of Dunnington, Bartholow & Miller, attorneys for the claimant Scarburgh Company, Inc. ("Scarburgh") in the above-entitled action, and have been admitted to practice before this Court. I am fully familiar with the matters set forth herein. This affidavit is submitted in support of the application of Dunnington, Bartholow & Miller for an allowance as compensation for their services in successfully opposing the Petition of the Official Creditors Committee for an Allowance dated March 8,

1974.

2. In accordance with Section 62 of the Bankruptcy Act, deponent states that no agreement or understanding exists between the aforesaid firm and any other person for a division of compensation.

3. The aforesaid firm has not entered into any agreement, expressed or implied, with any party in interest including the debtor, any creditor or representative of any of them, or with any attorney for any such party in interest in the proceeding for the purpose of fixing the fees or other compensation to be paid to such party in interest in the proceeding for services rendered or expenses incurred in connection therewith from the assets of the estate in excess of the compensation allowed by law.



Richard E. Rieder

Sworn to before me this  
21<sup>st</sup> day of January 1975.

Phyllis Greenstein

Notary Public

PHYLLIS GREENSTEIN  
NOTARY PUBLIC, State of New York  
No. 31-6659750  
Qualified in New York County 1976  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, : No. 63-B-1021  
LTD., : APPLICATION FOR ALLOWANCE  
Debtor. :  
-----x

TO THE HONORABLE SYLVESTOR J. RYAN, United States  
District Court Judge

The application of Dunnington, Bartholow & Miller re-  
spectfully shows and alleges:

1. This application is filed in support of a request  
for compensation for services rendered by Dunnington, Bartholow &  
Miller in successfully opposing the petition of the Official  
Creditors Committee of the debtor for an allowance.

Background

2. Since this Court is familiar with this proceeding,  
having presided over it for over a decade, we have set forth herein  
only a brief outline of the background. American Express Ware-  
housing Company, Ltd. ("Limited"), a wholly-owned subsidiary of  
American Express Company ("Amexco"), was engaged in warehousing

cils and animal fats. In 1963, it operated a tank farm in Bayonne, New Jersey comprised of tanks leased to it by Allied Crude Vegetable Oil Refining Corporation ("Allied"). Allied operated a refining plant connected to Limited's tank farm.

3. Limited issued receipts to suppliers of commodities stored in its tanks and to dealers, brokers and financial institutions as security for loans made to Allied or for its account. Scarburgh Company, Inc. ("Scarburgh") was one such broker. Many of such loans were secured by receipts issued by Limited.

4. On November 19, 1963, Allied filed a petition in bankruptcy in the United States District Court for the District of New Jersey and was shortly thereafter adjudicated a bankrupt.

5. After Allied's collapse it was discovered that much of the oil covered by Limited's receipts had been removed from its tanks and a large number of receipts were forgeries.

6. On December 30, 1963, Limited filed for reorganization under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York. Shortly thereafter, its creditors formed an unofficial creditors' committee made up of individual attorneys who were members of the law firms which represented some of the largest creditors.

7. On January 28, 1964, the first meeting of creditors was held. At that meeting, the members of the unofficial creditors' committee were elected to the Official Creditors' Committee ("OCC"). During the following years these members of the OCC served as such. They were currently compensated for their work and the work of their firms by certain creditors of the debtor. On May 10, 1967 the Plan of Arrangement was confirmed by this Court.

The Petition

8. On March 8, 1974, David Hartfield, Jr. as Chairman of the OCC submitted a petition to this Court seeking an order granting an allowance for the services rendered by the members of the OCC. The allowance, if granted, would be used to reimburse the particular creditors of Limited who paid the fees of members of the OCC.

9. Dunnington, Bartholow & Miller, as attorneys for Scarburgh, a creditor of Limited, opposed the request of the majority of the members of the OCC on the ground that there was no basis in law for payment of the fees of the members of the OCC out of the funds of the debtor.

10. At first, Dunnington, Bartholow & Miller attempted to oppose the petition on an informal basis. When it became apparent that this type of opposition would not be successful, we submitted an affidavit and lengthy Memorandum of Law in opposition

to the petition. We also appeared at a hearing before this Court on March 28, 1974 to oppose the OCC's request.

11. By an order dated June 28, 1974, this Court denied the petition of the OCC. That order absolutely denied the request of \$692,353.65 for the fees of members of the OCC. Certain other requests (OCC disbursements, fees of Dewey, Ballantine, Bushby, Palmer & Wood, fees for the Secretary and Acting Secretary of the OCC, fees of Arthur Andersen & Company) were denied without prejudice to renewal upon a proper showing with itemized detail.

12. This order is now final as the time for appeal has expired without any party having entered a notice of appeal.

The Services Performed by Dunnington, Bartholow & Miller

13. The services of Dunnington, Bartholow & Miller are itemized and set forth in detail in Exhibit A annexed hereto. For the convenience of the Court, they are summarized in the body of this application.

14. Upon receiving notice of the proposed petition of the OCC, we undertook the task of ascertaining whether there was any basis for such an application in any orders of this Court, in any agreements among the creditors or in the debtor's Plan of Arrangement. Avenues of research included the court records of this proceeding and Scarburgh's files and conferences with other attorneys involved in the proceeding.

15. As we found no basis for the OCC's petition in prior proceedings in this matter, extensive legal research into the bankruptcy laws was undertaken. In addition we held various informal discussions with the firms of OCC members in order to ascertain whether there was any legal basis for the petition.

16. After lengthy consideration of the results of our research and the effect that the granting of the petition would have upon various creditors, we determined that a basis for this request did not exist either in law or equity. Thereafter we commenced informal discussions with members and firms of members of the OCC in an effort to prevent the petition from being filed with this Court.

17. On March 18, 1974, we received the Notice of Hearing, Petition for Allowance of the OCC, and the affidavits of David Hartfield, Jr., Hamilton G. Kenner and Murray H. Warschauer. After consultation with the Scarburgh directors, informing them of our conclusions based on the research we had completed, the board of directors authorized this firm to conduct further research and if deemed appropriate to formally oppose the petition.

18. Further factual investigation was conducted including calls to the attorneys of the debtor, the administrators of the various Amexco funds set up by the Amexco Proposal, and members of the law firms represented on the OCC. We also performed further legal research. Extensive research was conducted into the Bank-

ruptcy Rules, including the then proposed new rules, and into decisions of all federal courts.

19. As our research disclosed no legal or equitable authority for the request of the OCC, we prepared a lengthy Memorandum of Law and supporting affidavit setting forth in detail the authorities which prohibited the granting of such an allowance.

20. Subsequently, attorneys from this firm appeared at the hearing held before this Court on March 28, 1974, and spoke in opposition to the OCC request. The OCC, having submitted an affidavit and Memorandum of Law contending that their petition was proper, also appeared and argued in support of their petition. Counsel for the debtor in response to the Court's inquiry indicate that the debtor took no position with respect to the petition of the OCC. At that time, the Court indicated that it would grant the request of the OCC.

21. After the hearing and upon receipt of the Notice of Settlement and proposed order of the OCC, attorneys in this firm consulted with the board of directors of Scarburgh. The board decided at that time to immediately appeal the decision of this Court if the proposed OCC order was signed.

22. In an effort to prepare for the anticipated appeal, this firm undertook further research. Most of that research was focused upon cases cited by the OCC in its Memorandum of Law. The Sapphire Steamship decision was analyzed in depth. Conferences were held with the counsel for the trustee of the bankrupt in that matter in order to ascertain the background facts out of which the decision arose. The legal precedents upon which that decision and others were based were also researched. Finally, all this material was composed into memoranda from which the brief on appeal would be written.

23. On June 6, 1974, this Court handed down a Memorandum Opinion denying the petition of the OCC. After a complete analysis of that decision, Dunnington, Barthelow & Miller prepared an appropriate Order with Notice of Settlement which was mailed to all creditors.

24. On June 28, 1974, this Court signed and entered the Order we had prepared denying the OCC Petition. Subsequent thereto, on July 3, 1974, this firm served a copy of that Order and Memorandum Opinion upon all of the creditors and interested parties who had appeared in this proceeding.

25. The time expended by members of this firm which is itemized and substantiated in Exhibit A annexed hereto is

summarized as follows: Senior Partners have expended 31.75 hours, Partners have expended 60.75 hours and associates have expended 266.00 hours. In addition, other nonrecorded time has been spent in informal discussions within this firm which was not capable of being differentiated on a time basis from other topics discussed. Finally, disbursements of \$109.00 were incurred in preparing and copying the opposition papers and the Order and serving them upon the parties to this proceeding.

The Legal Basis for Application

26. The general rule laid down in the Second Circuit in In re Progress Lektro Shave Corporation, 117 F.2d 602 (2nd Cir. 1941), and In re Porto Rican American Tobacco Co., 117 F.2d 599 (2nd Cir. 1941) is that it is the duty of the trustee to perform all services necessary for the administration of the bankrupt estate. Compensation could not be paid from the estate to others unless (1) they benefitted the estate, (2) the trustee refused to act and (3) the court formally authorized one to act in his stead. This rule would also normally prevent a creditors' attorney from being paid compensation from the estate when there was an official creditors committee appointed to represent all the creditors' interests. However, as this Court itself has recognized in its opinion denying the petition of the OCC, there is an exception to this general rule. (Opinion of Judge Ryan dated June 6, 1974, at p.7)

27. If the attorneys of a creditor act in a situation where the trustee due to a conflict of interest, or otherwise, cannot or refuses to act and the creditor's attorneys' action results in a substantial savings to the estate, they may be compensated for these services from the debtor's estate. In re New York Investors, 130 F.2d 90, 92 (2nd Cir. 1942); accord, Sartorius v. Bardo, 95 F.2d 387, 390 (2nd Cir. 1938)

28. In New York Investors, the attorneys of the largest creditor opposed the allowances to be paid the trustees of the debtor and the attorneys for the trustees. They succeeded in reducing the fees by \$70,000 and then sought to be compensated for their services. The Court, in omitting the "prior approval test" and granting compensation, stated:

"Where the creditor has not unnecessarily duplicated the efforts of others, and where his services are such as the trustees cannot reasonably have been expected to perform, little

difficulty can arise from omitting the requirement. Since this is so, we think that considerable freedom in raising objections, for the benefit of the estate, to allowances which the trustees are unable or most unlikely to question, may wisely be accorded to interested creditors, and we will not here penalize the applicant for a departure from the better practice which appears not to have prejudiced the administration of the estate." (130 F.2d at 92)

Likewise, in Sartorius v. Bardo, supra, Judge

earned Hand stated:

"[O]bviously, if a creditor successfully opposes a proposal of the trustee, it is no answer to his demand for payment to say that the trustee was in charge; by hypothesis his intervention was necessary. Hence, the judge would not have been justified in denying this part of the petition, if any substantial advantage could be traced to the services." (95 F.2d 390)

29. In this proceeding, the OCC was seeking compensation for its services. It was quite clear that the OCC, designed to be the official watch dog to prevent unlawful or unfair distributions from the debtors' estate and to conserve those assets, would not oppose the fee applications of its members. Furthermore we specifically asked the attorneys for the debtor whether they would oppose the OCC petition. Accordingly, after a long delay, they informed us that they would take no position at all with respect to the petition. It was left to individual creditors to oppose the OCC's application for an allowance. Scarburgh filled this void. At their request, Dunnington, Bartholow & Miller successfully opposed the petition, resulting in substantial savings to the estate of the debtor which inured to the benefit of all the creditors.

30. Due to the denial of the OCC's petition, over \$700,000.00 was retained and distributed for the benefit of all the creditors.

31. On August 23, 1974, Dunnington, Bartholow & Miller submitted an application for an Order to Show Cause why certain fees should not be paid to it. This application was denied by this court on the ground that the debtor did not have funds out of which the fees could be paid. The denial was without prejudice to renewal if and when the debtor received any funds which had not already been earmarked to go to designated creditors. Dunnington, Bartholow & Miller has been informed by Cadwallader Wickersham & Taft, attorneys for the debtor, that there is now available \$26,532.61 for distribution to all creditors in this proceeding, pro-rata. Of this amount, \$1,718.75 was left in the Recovery Fund after the distribution ordered by this court on August 21, 1974 and \$24,813.86 is that portion of the Allied Crude Oil Bankruptcy dividend received by the debtor which is payable to all creditors pro-rata.

32. The applicant submits that in arriving at a determination of the amount of applicant's compensation this Court should consider not only the time and effort involved but the quality of services rendered, the standing of all counsel involved, the total amount involved, and the results achieved.

J 182a

WHEREFORE, applicant prays that an allowance be made to it in the sum of \$39,544.00 for services rendered, payable out of the funds distributable to all creditors pro-rata, in this proceeding.

Dated: New York, New York  
January 22, 1975

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DUNNINGTON, BARTHOLOMEW & MILLER

BY

A Member of the Firm

EXHIBIT A ANNEXED TO APPLICATION FOR ALLOWANCE

Omitted as unnecessary.

J 183a

**Exhibit A, Annexed to Foregoing Affidavit**

This Exhibit is the same as Exhibit B reproduced at  
pages 24a to 58a *supra*.

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**Exhibit B, Annexed to Foregoing Affidavit**

Omitted as unnecessary.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, : No. 63-B-1021  
LTD., : AFFIDAVIT IN OPPOSITION  
Debtor. : TO APPLICATION OF  
DUNNINGTON, BARTHOLOW  
& MILLER FOR AN ALLOWANCE

JACQUELIN A. SWORDS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and a member of the firm of Cadwalader, Wickersham & Taft, attorneys for the Debtor herein and submit this affidavit in opposition to the application of Dunnington, Barthclow & Miller (Dunnington) for an allowance in this proceeding.

2. In summary, as will be more fully described hereunder, the basis of the Debtor's objection to the instant application is that Dunnington's opposition to the Official Creditors Committee (OCC) application for an allowance was not made on behalf of creditors of the Debtor as a group nor did it inure to the benefit of all of its creditors. Quite to the contrary, it was made on behalf of one creditor alone, Scarburgh Company, Inc. (Scarburgh), and inured only to the benefit of that group of creditors

(of which Scarburgh was a member) which had paid less than their pro rata share of the fees and expenses of the OCC, all at the expense of those other creditors who had already paid more than their pro rata share of such fees and expenses.

3. The first meeting of creditors in this proceeding was held on January 28, 1964. At that meeting an Official Creditors Committee, made up of attorneys representing major creditors, was elected and thereafter approved by this Court, as follows: David Hartfield, Jr., Chairman, Lloyd K. Garrison, William Curtis Pierce, Roy C. Haberkern, Jr., Thomas F. Daly and Donald Marks. As appears from the Affidavit of David Hartfield, Jr., Esq. in support of the OCC's application for an allowance, a copy of which is annexed hereto as Exhibit A, this committee, on behalf of the creditors as a whole, along with many other benefits conferred, undertook extensive examination of the Debtor's files and deposed many witnesses, all as a background to protracted negotiations with American Express Company (AMEXCO), which in the end resulted in an agreement with AMEXCO that it would contribute upwards of \$60,000,000 towards the settlement of the claims against its subsidiary. The members of the OCC and their law firms were, in the main, paid by their own clients, with contributions in varying amounts from a number of other creditors, with still other

creditors paying nothing at all. This procedure was adopted with the expectation that on the termination of this proceeding the OCC would apply for an allowance, out of which it would refund to creditors all payments made to it; thus, in the end, spreading the cost of its operations pro rata among all of the creditors.

4. The OCC's application for an allowance came on to be heard on March 28, 1974. Dunnington opposed the application, on behalf of its client, Scarburgh, which had contributed only a very small amount to the OCC and which, therefore, was in the group that stood to benefit by the denial of the OCC application.

5. Dunnington was successful in its opposition to the OCC application. Indisputably, Dunnington's success benefited that group of creditors (including Scarburgh) which had paid less than their pro rata share of the OCC's expenses. Equally, clearly that benefit was at the expense of those other creditors who supported the OCC in amounts in excess of their pro rata shares.

6. Mr. Rieder, of the Dunnington firm, was right when he stated, in paragraph 29. of the Dunnington petition that, "we specifically asked the attorneys for the debtor whether they would oppose the OCC's petition. Accordingly, after a long delay, they informed us that they would take no position at all with respect to the petition." We

reached that conclusion after careful study based on our view that what was really involved was a dispute between two groups of creditors, a dispute which, in our view, had substantial merit on both sides, and a dispute as to which we, representing all of the creditors, should therefore remain neutral. Mr. Rieder is, however, for the reasons stated above, in our view quite wrong in the key statement in the concluding sentence of paragraph 29. that Dunnington's successful opposition to the petition resulted "in substantial savings to the estate of the debtor which inured to the benefit of all the creditors."

7. As stated by the United States Court of Appeals for the Second Circuit, in its recent decision in Sapphire Steamship Lines, et al. v. Winthrop, Stimson, Putnam & Roberts, et al. (filed January 14, 1975) (copy annexed as Exhibit B):

"As a general rule, therefore the fee of a creditor's attorney is not to be paid from the bankruptcy estate," [but that an exception to that rule is recognized in situations in which] "(1) the trustee has refused or neglected to act . . . (2) the applicant has conferred a tangible benefit on all the creditors by acting in the trustee's stead" and (3) that "the Bankruptcy Court must have formally authorized such attorney to act instead of the trustee." (Emphasis supplied.)

The Court went on to say that:

"A trustee 'refuses' or 'neglects' to act when he fails to satisfy a duty imposed upon him by the Bankruptcy Act, which requires that he Marshall the assets of the bankrupt and, as with all his substantive duties, exercise reasonable care in so doing."

Id. at 5-6.

The Dunnington firm fails on all three counts.

8. As to No. 1, the debtor-in-possession in a Chapter XI proceeding is akin to a Trustee in Bankruptcy. The Debtor did not refuse or neglect to act with respect to the OCC application, within the meaning of the above rule. The Debtor occupied no position in conflict with any party to the proceeding so as to give rise to the "special circumstances" discussed by the Court of Appeals in the Sapphire case at p. 7. Rather, the Debtor simply took a neutral position in the controversy as, it is submitted, it should, recognizing that the application involved a bona fide dispute between the two groups of creditors to both of which it owed an equal duty.

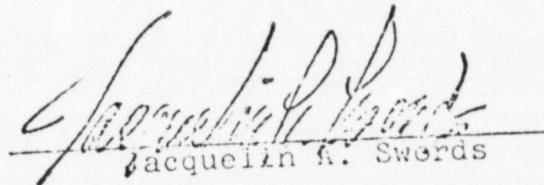
9. As to No. 2, the Dunnington firm's successful opposition did not confer a benefit on all of the creditors, but rather on one group only, at the expense of the other.

10. As to No. 3, the Dunnington firm received no formal authorization to act in the stead of the Debtor; it specifically stated that it represented Scarburgh in this dispute and took no position in regard to a suggestion that the Court appoint special counsel to represent

creditors who could have been adversely affected by the granting of the OCC's petition. The Court declined to appoint such special counsel in the interests of economy. Thus, the Dunnington firm now seeks relief which the Court in effect already denied.

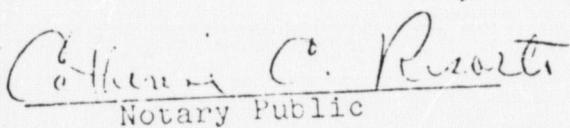
11. For the above reasons, it is respectfully submitted that the Dunnington application should in all respects be denied.

12. The Chairman of the OCC has requested that I also note his committee's objection to this application.



Jacqueline A. Swords

Sworn to before me this  
5<sup>th</sup> day of February, 1975



Catherine C. Ristoro  
Notary Public

CATHERINE C. RISTORO  
NOTARY PUBLIC, State of New York  
No. 24-222-730  
Oneida County  
Commissioned April 11, 1975

J 190a

1

1 sljp

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 In the Matter :  
6 -of- :  
7 AMERICAN EXPRESS WAREHOUSING, LTD., : 63-B-1021

8 Debtor. :  
9 -----x

10 February 10, 1975  
11 10:30 a.m.

12 BEFORE:

13 HON. SYLVESTER J. RYAN

14 A P P E A R A N C E S:

15 DUNNINGTON, BARTHOLOW & MILLER, ESQS.

16 Attorneys for applicant,  
161 East 42nd Street,  
New York, N.Y.

17 BY: CHARLES STEWART, ESQ.,  
RICHARD RIEDER, ESQ.,  
Of Counsel

18 CADWALADER, WICKERSHAM & TAFT, ESQS.

19 Attorneys for debtor,  
1 Wall Street,  
New York, N.Y.

20 BY: JACQUILLIN A. SWORDS, ESQ.,  
EARL NEMSER, ESQ.,  
Of Counsel

21 MILBANK, TWEED, HADLEY & McCLOY, ESQS.

22 Attorneys for Chase Manhattan Bank,  
BY: SAMUEL L. BALLIN, ESQ.,  
Of Counsel

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2 THE COURT: Mr. Stewart, you are here repre-  
3 senting the firm of Dunnington, Bartholow & Miller?

4 MR. STEWART: Yes, your Honor.

5 THE COURT: Of 161 East 42nd Street?

6 MR. STEWART: Yes, sir.

7 THE COURT: You are here as counsel, you say,  
8 for Scarburgh?

9 MR. STEWART: That is right, sir.

10 THE COURT: And what is Scarburgh's interest  
11 in the debtor estate?

12 MR. STEWART: Scarburgh is a substantial credi-  
13 tor of the debtor, your Honor.

14 THE COURT: You describe yourself as counsel.  
15 Who were the attorneys of record for Scarburgh?

16 MR. STEWART: Originally, your Honor, they were  
17 Lord, Day & Lord, but Lord, Day & Lord felt because of  
18 their representation of other entities in the Isbrandtsen  
19 complex that they did not wish to continue to represent  
20 Scarburgh, and we took over the general representation  
21 of Scarburgh, including Scarburgh's position as creditor  
22 in these proceedings.

23 THE COURT: What is Isbrandtsen's interest in  
24 this at all, in this debtor estate? What was their interest  
25 in the debtor estate?

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2 MR. STEWART: I don't think, your Honor, that  
3 they were that interested in the estate as such other than  
4 to Scarburgh, but they felt they had other conflicts in  
5 this situation.

6 THE COURT: And they withdrew?

7 MR. STEWART: Yes, sir.

8 THE COURT: And you were substituted then as  
9 the attorneys for Scarburgh in the place of Lord, Day &  
10 Lord?

11 MR. STEWART: That is right, sir.

12 THE COURT: All right.

13 MR. BALLIN: Your Honor, our firm, Milbank,  
14 Tweed, Hadley & McCloy represents the Chase Manhattan Bank.  
15 We filed a substantial claim for Chase, which was allowed  
16 in the approximate amount of \$3 million.

17 However, since the original allowance of the  
18 claim, Dr. Feinstein, who is the president and principal  
19 stockholder of Amatrade arranged for Amatrade to pay the  
20 balance of this debt to Chase, so that our client assigned  
21 the claim back to Amatrade.

22 He is not here, but we have, until formal  
23 transfer of the interest, followed the matter for Ama-  
24 trade and for that claim.

25 And so I am here, really, as an observer.

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2 THE COURT: As an observer only?

3 MR. BALLIN: Yes. I can't speak for the good  
4 doctor. He always is able to speak for himself.

5 THE COURT: What is Chase's interest in this  
6 now?

7 MR. BALLIN: We have no financial interest in  
8 this because Dr. Feinstein, with the help of one of the  
9 other claimants paid off the balance of the Amatrade debt  
10 to Chase, and the claim was formally assigned to the other  
11 claimant who had advanced the money to the doctor, and I  
12 understand that has been paid off so that the beneficial  
13 interest in the claim was allowed to Chase is now in Ama-  
14 trade.

15 THE COURT: Now Mr. Swords, you represent the  
16 debtor estate, do you?

17 MR. SWORDS: That is right, your Honor.

18 THE COURT: Or the debtor?

19 MR. SWORDS: The debtor.

20 THE COURT: Not the debtor estate. The debtor.

21 MR. NEMSER: I am here with Mr. Swords.

22 THE COURT: What is your name, for the record?

23 MR. NEMSER: My name is Earl Nemser.

24 THE COURT: I have an order to show cause here  
25 which I signed on January 24, 1975, and this I signed at

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2 that time on that endorsement by Mr. Walsh, of your firm,  
3 Mr. Swords.

4 MR. SWORDS: Yes.

5 THE COURT: Saying that you consented to the  
6 signing of the order to show cause which was made return-  
7 able today, but you wished to be heard in opposition to  
8 it, to the granting of the relief sought, is that correct?

9 MR. SWORDS: That is correct, your Honor.

10 THE COURT: That is your position?

11 MR. SWORDS: That is correct, your Honor.

12 THE COURT: So what I have then is a hearing  
13 in this order to show cause which was issued on January  
14 24, 1975 which requires the creditors and all interested  
15 parties who are listed in Exhibit A, which is annexed to  
16 the order to show cause, why they should not be heard on  
17 this application of Dunnington, Bartholow & Miller asking  
18 for an allowance or the granting to them of an allowance  
19 of \$39,544.

20 Do you oppose that?

21 MR. SWORDS: We oppose that, your Honor.

22 THE COURT: And do you oppose it in toto?

23 MR. SWORDS: That is correct, your Honor.

24 THE COURT: The purpose of the hearing now,  
25 being the hearing on this order to show cause, is to hear

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2 the firm of Dunnington, Bartholow & Miller in support of  
3 this request, you wish to be heard in opposition?

4 MR. STEWART: That's correct, your Honor.

5 THE COURT: I think we should hear from them  
6 first.

7 Mr. Nemser, I don't hear two people, ordinarily,  
8 in the same matter, so Mr. Swords will have to speak for  
9 the debtor or the debtor estate.

10 MR. NEMSER: That is quite all right, sir.

11 THE COURT: All right.

12 Who wishes to be heard now in support of this  
13 order to show cause for the granting of this allowance?

14 MR. STEWART: Your Honor, I would like to be  
15 heard on behalf of the Dunnington firm making an applica-  
16 tion for legal fees arising out of their successful oppo-  
17 sition to the application for counsel fees by the official  
18 Creditors Committee which resulted in a saving for the  
19 debtor's estate of something in the area of \$700,000.

20 And since our opposition to this application  
21 by the official Creditors Committee was made before your  
22 Honor, I don't see any point in reciting factual back-  
23 ground, because your Honor is familiar with what we did.

24 THE COURT: Well, if you don't want to do it,  
25 you don't have to, but I think it might be desirable for

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2 you to do so on the record.

3 MR. STEWART: All right, sir.

4 THE COURT: If you don't wish to do so, you  
5 don't have to. I want to know your position in full. If  
6 you desire to express it, now is the time to do it.

7 MR. STEWART: As set forth in our papers, your  
8 Honor, we spent some 30 hours of senior partner time; 60  
9 hours of partner time and 266 hours of associate time in  
10 opposing the application of the official Creditors Commit-  
11 tee for counsel fees.

12 I think we have a fairly unique fact situation,  
13 your Honor, here, where the official Creditors Committee  
14 which, under our bankruptcy set-up, is designed to be the  
15 official watchdog of the assets of the debtor and has the  
16 obligation to guard the debtor's estate, was actually the  
17 party making an application for counsel fees in excess of  
18 \$700,000.

19 And under the circumstances they could hardly  
20 be expected to oppose their own fee application for counsel  
21 fees.

22 There were minority members of the committee,  
23 your Honor, who felt that the application should not be  
24 made, but rather than voicing their opposition they elected  
25 to remain silent.

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2 And again we had the debtor, which also had an  
3 obligation to marshal the assets of the estate and preserve  
4 them and oppose any authorized applications for fees, and  
5 it too, elected to remain silent.

6 We did try to persuade counsel for the debtor  
7 to oppose the application, and we were first told, I think,  
8 first that they didn't have much experience in bankruptcy  
9 and weren't that knowledgeable in bankruptcy law. And  
10 when we spoke to them they said they didn't what position  
11 they would take; and I think either at the hearing or shortly  
12 before advised that they would not brief the question and  
13 that they would not oppose the application and would not  
14 take any position with respect to the application.

15 Now, I understand they are opposing us here,  
16 and I would just like to make the point to your Honor,  
17 that if they had been as zealous in preserving the assets  
18 of the debtor estate at the time the official Creditors  
19 Committee made its application, I wouldn't be here today  
20 at all.

21 THE COURT: What was the nature of the services?  
22 What legal services did you render that required all this  
23 labor and time spent by partners, senior partners, asso-  
24 ciates and--who else? Clerical help?

25 MR. STEWART: No, sir, I have not included

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2 that, but there was clerical help as well.

3 THE COURT: What was the nature of the services  
4 that you performed here?

5 MR. STEWART: When we learned that this appli-  
6 cation was to be made, your Honor, we could find no legal  
7 basis for the application, and so we tried first of all  
8 to dissuade the official Creditors Committee for making  
9 the application at all.

10 When that was unsuccessful we also tried to  
11 dissuade the debtor to oppose it and we were not success-  
12 ful there either.

13 We then researched the point by going through  
14 the Court records here and doing legal research to try to  
15 find out if there were any legal bases for the application  
16 at all, and we could find none.

17 THE COURT: Were you looking for legal bases  
18 or did you just spend this time examining Court records  
19 and files?

20 MR. STEWART: We did both, your Honor.

21 THE COURT: You don't expect to be paid for  
22 that, do you, to be paid for examining legal records?

23 MR. STEWART: We didn't know but what there  
24 might be something in the Court records, the records of  
25 this case which permitted it, and we had always taken the

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2 position--

3 THE COURT: You didn't regard that as legal  
4 work, looking at records, did you?

5 MR. STEWART: That is what our lawyers did,  
6 your Honor.

7 THE COURT: Whose lawyers?

8 MR. STEWART: The attorneys in our firm.

9 THE COURT: When you say you, you are speaking  
10 of your firm?

11 MR. STEWART: Yes.

12 THE COURT: You don't speak of them as dif-  
13 ferent personalities.

14 Now, what would be your interest in the fund  
15 anyway? What interest did you have in the fund?

16 MR. STEWART: Our interest in the fund rose  
17 because of our representation of Scarburgh which had a  
18 claim of some \$27 million against this debtor.

19 THE COURT: Were they entitled to a share in  
20 it or had they surrendered their right to that?

21 MR. STEWART: They were entitled to share in  
22 it, your Honor.

23 THE COURT: To what extent? What was the  
24 nature of their right to share in this fund, and where  
25 did they get that right? How did they come into possession

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2 of that right?

3 MR. STEWART: They came into the possession of  
4 that right, your Honor, through their activities in financ-  
5 ing salad oil transactions as to which they received paper  
6 from the American Express Warehousing, Ltd., and their  
7 right as a creditor arose through their ownership of that  
8 Mexico paper, that American Express Warehousing paper.

9 THE COURT: Has Scarburgh filed any claim?

10 MR. STEWART: Yes, sir. The claim was filed  
11 from the very beginning. I believe Scarburgh, as a matter  
12 of fact, may be the largest creditor in the picture.

13 THE COURT: Was it brought on for hearing and  
14 was it allowed or granted?

15 MR. STEWART: Yes, sir, it was.

16 THE COURT: When, and by what order?

17 MR. STEWART: I don't know the exact date but  
18 it came on to be heard and was allowed.

19 MR. SWORDS: If your Honor please--

20 THE COURT: Let him finish, if you will. I  
21 don't want to interrupt you, Mr. Swords, but I don't want  
22 to interrupt him. I want him to make a full and complete  
23 statement of the basis of his claim and any facts that  
24 he wants to have brought to the Court's attention which  
25 would support the basis of his claim for compensation.

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2 MR. STEWART: I believe Scarburgh is the largest  
3 single creditor and its claim has been allowed if not in  
4 full, almost in full. And I believe the amount of the  
5 claim was \$27 million or \$28 million, and I understand  
6 that was finally reduced to \$21 million in this proceeding.

7 Your Honor, the lead case is in the Second  
8 Circuit--

9 THE COURT: Let's keep to the facts first.  
10 We will come to the law in a minute or two.

11 How do you fix this amount in this sum of  
12 \$39,544? How do you arrive at that amount? How do you  
13 come to that amount? That is something I don't understand.

14 MR. STEWART: Your Honor, that amount was com-  
15 puted based on our time charges, the amounts involved here--

16 THE COURT: Time charges for doing what?

17 MR. STEWART: For doing legal research and  
18 other negotiations with respect to the application of the  
19 fees of the official Creditors Committee.

20 THE COURT: Have you submitted an itemized  
21 statement showing that?

22 MR. STEWART: Yes, sir, it is in our papers,  
23 your Honor, and I think we have on a day by day basis set  
24 forth just what we did.

25 THE COURT: Is there anything else that you

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2 want to tell me?

3 MR. STEWART: Not by way of factual background,  
4 your Honor, but I would like to just discuss briefly what  
5 I believe the applicable law is on this situation.

6 THE COURT: All right.

7 MR. STEWART: There appear to be two lead cases  
8 here in the Second Circuit, one called New York Investors,  
9 and the other, a recent Second Circuit decision called  
10 Sapphire Steamship.

11 THE COURT: There's a decision which I think  
12 might be in point or might well be considered in point  
13 which was decided in the Court of Appeals on January 14,  
14 1975--

15 MR. STEWART: Yes, sir.

16 THE COURT: Which was just shortly before you  
17 secured your order to show cause, and was decided long  
18 after your services were performed.

19 MR. STEWART: Yes, sir.

20 I think those two cases spell out three ingre-  
21 dients that have to be present before a creditor can collect  
22 counsel fees for his services to the debtor's estate, and  
23 I think the first element is that it has to be a situation  
24 where the trustee - in this case the debtor in possession -  
25 neglects or refuses to act, and I don't know whether we

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2 should term it neglect or refusal to act, but under these  
3 circumstances they didn't act, your Honor.

4 The second element is that the creditors'  
5 activity has to confer a benefit for the estate of the  
6 debtor, and benefit all of the creditors across the board,  
7 and I submit that's exactly what happened here, is that  
8 our opposition to the application of the official Creditors  
9 Committee and our briefing of the question resulted in a  
10 saving of some \$700,000 for the debtor's estate.

11 The third element that has to be present, your  
12 Honor, is that the Court must authorize the creditor to  
13 take the position that it takes; and as your Honor will  
14 recall, at the hearing on March 28th of last year, your  
15 Honor permitted us to be heard, to brief the question and  
16 to submit our papers in opposition.

17 And I believe that because of the special  
18 circumstances of this case it would also fall within the  
19 special circumstances doctrine set forth in the New York  
20 Investors case.

21 THE COURT: What is the citation of the New  
22 York Investors case?

23 MR. STEWART: I have it in my papers, your  
24 Honor.

25 THE COURT: The Sapphire case we have identi-

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2 fied as being decided on January 14, 1975.

3 MR. STEWART: Yes.

4 THE COURT: In the Second Circuit Court of  
5 Appeals, an appeal from a decision by Judge Pollack of  
6 this Court, and is known as Docket No., in the Court of  
7 Appeals, 74-1533.

8 MR. STEWART: Yes, sir.

9 THE COURT: Now what is the other citation  
10 that you want to call to the Court's attention?

11 MR. STEWART: The other citation, your Honor,  
12 is 130F 2nd 90, Second Circuit, 1942.

13 THE COURT: And that holds what?

14 MR. STEWART: That holds, your Honor, that  
15 where these three points are met by a creditor, in other  
16 words, the refusal of the debtor to act, or the trustee  
17 to act, the act of the creditor benefits the estate as a  
18 whole, and the Court has authorized the creditor to take  
19 the action he takes, or there are other special circum-  
20 stances warranting the action that the creditor takes,  
21 the creditor may receive compensation for counsel fees  
22 for having benefitted the estate.

23 THE COURT: First, let me ask you, was there  
24 any order entered by the Court authorizing the appearance  
25 of your firm in this matter, or authorizing the employment

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2 by your firm in this matter to appear for the estate or  
3 for the creditors?

4 MR. STEWART: No, sir, there was not.

5 THE COURT: Was there any application made at  
6 any time for such an order?

7 MR. STEWART: We didn't realize at the time,  
8 your Honor, that such an order was required, but--

9 THE COURT: Was there any application made at  
10 any time?

11 MR. STEWART: For a formal Court order?

12 THE COURT: Yes.

13 MR. STEWART: No, sir. We were heard in your  
14 Courtroom on March 28th.

15 THE COURT: Of what year?

16 MR. STEWART: Of 1974.

17 THE COURT: Now, you spoke of there being  
18 special circumstances.

19 Do you claim that there were any special cir-  
20 cumstances for this case--

21 MR. STEWART: Yes. I think the special cir-  
22 cumstances, your Honor, was the fact that--

23 THE COURT: You anticipate me a little. I  
24 want to get your full position on the record.

25 Do you claim that there were any special

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2 circumstances in this case which would justify your appear-  
3 ance in this before this Court representing the estate or  
4 the creditors which would thus support your present appli-  
5 cation?

6 MR. STEWART: Yes, sir.

7 I think the special circumstances which are  
8 present here, your Honor, is that those parties, namely,  
9 the debtor in possession and the official Creditors Com-  
10 mittee, who would ordinarily be the parties to oppose fee  
11 applications as to which there was no legal basis because  
12 of the peculiar fact situation did not take that position  
13 here.

14 And, we were the only creditor who not only  
15 opposed the application but also briefed the question for  
16 the Court.

17 THE COURT: You claim that as a result of your  
18 services the estate benefitted, and, if so, in what amount?

19 MR. STEWART: I believe it is in excess of  
20 \$700,000; \$746,000. I believe that's right, your Honor.

21 THE COURT: Assuming that you did, the fee  
22 that you ask, the amount that you ask seems extremely small,  
23 doesn't it?

24 MR. STEWART: Yes, sir.

25 THE COURT: Why are you so generous to the

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2 estate in asking for such a small amount where you claim  
3 you brought such substantial benefits to the estate and  
4 to the parties interested in it?

5 MR. STEWART: Your Honor, I debated this ques-  
6 tion with my partners at length and I thought we should have  
7 asked for more too.

8 THE COURT: But you came to the conclusion that  
9 you should not?

10 MR. STEWART: We came to the conclusion that  
11 we should collect our time charges and something--

12 THE COURT: What prompted your generosity in  
13 this respect? What were the unusual circumstances, if  
14 any?

15 MR. STEWART: We should have perhaps asked for  
16 more, your Honor--

17 THE COURT: Well, were there any unusual cir-  
18 cumstances? You hedge around. I am trying to find out  
19 what your position is here and I can't get it from you.

20 MR. STEWART: We are only claiming what we  
21 are claiming, your Honor. We are not claiming any ex-  
22 cess--

23 THE COURT: Of course you are not claiming  
24 what you are not claiming. That is talking through your  
25 hat. I want to know, is there any special circumstances

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2 which prompts you to ask this very minimal fee in propor-  
3 tion to what you say were the benefits which the estate  
4 gained as a result of your services, or the creditors gained  
5 as a result of your services.

6 MR. STEWART: If your Honor wishes to increase  
7 the application we are perfectly willing to do it.

8 THE COURT: Now, please.

9 I want to know why it was set forth in such a  
10 minimal amount, comparatively minimal amount.

11 Are there any special circumstances?

12 MR. STEWART: I believe the only special cir-  
13 cumstances that are present, your Honor, is that my partners  
14 persuaded me not to ask for more.

15 THE COURT: Is there anything else that you want  
16 to do at this time before I hear from Mr. Swords?

17 MR. STEWART: The only other point I would like  
18 to make, your Honor--

19 THE COURT: Take your time.

20 MR. STEWART: Your Honor, the only point I  
21 would like to make is that although we are seeking attorneys  
22 fees in the amount set forth in the application, which is  
23 \$39,504, we only ask that it be satisfied out of those  
24 assets in the debtor's estate that are available pro rata  
25 for all of the creditors; and the reason for that is that

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2 we realize it would be unfair to some of the other creditors  
3 as to whom certain amounts have already been allocated to  
4 try to satisfy our fee application out of those sums, and I  
5 am told by Mr. Swords that there is now some \$26,000 in the  
6 estate which is available for all of the creditors across  
7 the board.

8 So that we ask that our fee application be satis-  
9 fied out of those unrestricted funds that are available.

10 THE COURT: All right, I will hear you, Mr.  
11 Swords.

12 Tell me what the position of the debtor or the  
13 debtor estate is on this.

14 MR. SWORDS: Thank you, your Honor.

15 I think I should start by stating my surprise  
16 that anybody in our office in 1974 said we had little or  
17 no experience in bankruptcy, because we had been taught  
18 bankruptcy at your Honor's knee for ten years by that time.

19 Our basic fundamental objection to this appli-  
20 cation, a point that Mr. Stewart has not mentioned in his  
21 presentation, is that his application or his services ren-  
22 dered in defeating the official Creditors Committee's  
23 application did not benefit all of our creditors but only  
24 benefitted that group which had not throughout the years  
25 paid their pro rata share of the official Creditors

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2 Committee's expenses, and it was at the expense of those  
3 who had paid more than their pro rata share.

4 As appears in Mr. Hartfield's affidavit which  
5 supported his application which we have annexed as an ex-  
6 hibit, and as is also recognized in the applicant's peti-  
7 tion here, the allowance that the official Creditors Com-  
8 mittee was seeking was, in the main, and I think it was  
9 80 to 85 per cent designed to, and would have gone back  
10 to those other creditors who had supported the official  
11 Creditors Committee throughout this period of time.

12 Therefore, the supporting creditors would have  
13 been benefitted by the granting of the OCC application on  
14 the one hand, whereas those who had not borne their fair  
15 share of those expenses would have been benefitted by its  
16 denial.

17 When Mr. Stewart or Mr. Rieder first asked us  
18 what our position was going to be, we did say that we  
19 wanted to think about it.

20 I remember many discussions in our office on  
21 this point, and we came to the conclusion, number one,  
22 that this was, in fact, nothing more nor less than a dis-  
23 pute between one group of creditors on the one hand and  
24 another group of creditors on the other hand.

25 It was our view, this case not having been

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2 presented, a case of this type never having been squarely  
3 presented, it was our view at that time that there was a  
4 great deal to be said on both sides.

5 It was our view that we owed an equal duty to  
6 each of the groups of creditors involved who are in con-  
7 flict with each other, and it was our conclusion as a  
8 result of those determinations that we should take a neu-  
9 tral position, and we so informed your Honor on the hearing  
10 of this matter that we were taking a neutral position.

11 So much for the special circumstance.

12 The only special circumstance that I know of  
13 that has justified an award to counsel who have not been  
14 appointed by the Court is where the trustee who would nor-  
15 mally take the same position, and I would point out that  
16 in a Chapter XI proceeding, as your Honor well knows, the  
17 debtor in possession is essentially the trustee.

18 It is only where the trustee has an interest  
19 in conflict to the interest being taken by the attorney  
20 seeking the allowance for having benefitted the estate.

21 In our case we had no interest in conflict with  
22 any of our creditors. We were simply bystanders watching  
23 a dispute between two groups of creditors as to both of  
24 which we believed there was real merit.

25 The second point: In every single instance in

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2 which an award has been allowed to counsel representing one  
3 of the creditors, the first and primary requirement is  
4 that his services shall have benefitted all the creditors.

5 In this case, as I have, I think, said three  
6 times already, the services benefitted one group of  
7 creditors at the expense of the other group, and for  
8 that reason, and primarily for that reason I submit to your  
9 Honor that this application should in all respects be  
10 denied.

11 THE COURT: What was the nature of the expenses  
12 incurred by the official Creditors Committee to which you  
13 say Scarburgh in no way contributed?

14 MR. SWORDS: Well, I don't say that Scarburgh  
15 in no way contributed because Scarburgh at that time was  
16 represented by the firm of Lord, Day & Lord, and the prin-  
17 cipal partner of Lord, Day & Lord in charge of this matter  
18 was Mr. Tom Daley, who was a member of the official  
19 Creditors Committee.

20 So Scarburgh got, albeit for practically nothing,  
21 got all the benefits going to the creditors as a whole  
22 through among other one of its own attorneys.

23 Incidentally, another member of the Creditors  
24 Committee was Mr. Roy Haberkorn, who was a partner of  
Milbank, Tweed, which is also represented in this hearing.

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2 The services rendered by the official Creditors  
3 Committee as a committee started with a massive discovery.  
4 Examination of every single document in I don't know how  
5 many file cabinets in the possession of the American  
6 Express Warehousing, Ltd., the debtor, and your Honor will  
7 remember that there was a special room, your Honor set up  
8 a special room on the top floor of this building so that  
9 all creditors could see these documents--

10 THE COURT: So that there could be coordina-  
11 tion of discovery by a committee of creditors as a group.

12 MR. SWORDS: That is correct.

13 THE COURT: Rather than have all the papers  
14 scattered amongst the various creditors who were--I forgot  
15 how many in number.

16 MR. SWORDS: 38, I believe, 33, 38, something  
17 in that neighborhood.

18 THE COURT: And Scarburgh was one of those.

19 MR. SWORDS: Scarburgh was one of those, your  
20 Honor.

21 THE COURT: Right.

22 MR. SWORDS: The official Creditors Committee  
23 issued a report that would sell for a good \$7.50 if it was  
24 a novel these days; it was a nice flat book which your  
25 Honor probably remembers. The official Creditors Committee

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2 took--

3 THE COURT: I don't remember it, and if there  
4 is a volume around maybe we should have it marked as an  
5 exhibit in case there is an appeal here.

6 MR. SWORDS: I don't have it with me but I  
7 will have one for your Honor.

8 THE COURT: Well, we will consider it marked  
9 as an exhibit in opposition.

10 MR. SWORDS: There were extensive depositions  
11 taken before your Honor by the official Creditors Committee.  
12 Their thrust then was related to the general liability of  
13 the debtor and to liability, if it existed, of the debtor's  
14 parent.

15 After--my recollection is a little dim, but  
16 I would say after some two years of intensive negotiation  
17 with counsel for the American Express Company an agree-  
18 ment was arrived at on behalf of the creditors which had  
19 been negotiated on their behalf by the official Creditors  
20 Committee and the American Express Company whereby the  
21 American Express Company contributed upwards of \$60 million  
22 to the satisfaction of the then \$144 million worth of  
23 filed claims against the debtor.

24 THE COURT: Did Scarburgh participate in that  
25 fund that was created?

1 sljp

2 MR. SWORDS: Indeed it did, yes, your Honor.

3 THE COURT: Did it get a share?

4 MR. SWORDS: It received its full pro rata

5 share by way of dividends.

6 THE COURT: And did it sign any papers or enter  
7 into any written document?8 MR. SWORDS: Yes, your Honor. Scarburgh agreed  
9 to the American Express Company proposal whereby the 60  
10 million odd dollars were advanced by the creditors as a  
11 whole and that Scarburgh also accepted the Plan of Arrange-  
12 ment which was approved by your Honor.13 Scarburgh also after very complicated negotia-  
14 tions entered into a stipulation with the debtor reducing  
15 its claim by some five or \$6 million, I believe.

16 MR. STEWART: I think that is right.

17 MR. SWORDS: And as reduced each claim was  
18 allowed on consent of the debtor and on approval of your  
19 Honor.20 THE COURT: And participated in by receiving  
21 its pro rata share?

22 MR. SWORDS: It did.

23 The official Creditors Committee did many other  
24 things which are set forth in Mr. Hartfield's affidavit  
25 which is annexed to our affidavit in opposition.

1 sljp

2 They followed all of the insurance litigation,  
3 as your Honor no doubt remembers. They were active in the  
4 problems that we had with the custodial receiver, Mr.  
5 Feder, over in New Jersey in disposing of all of the  
6 peculiar things that were found in those tanks, and they  
7 did many other things on behalf of the creditors as an en-  
8 tire group.

9 Now, Mr. Hartfield has stated in his affidavit,  
10 and I am obviously certain it is true that every one of  
11 these firms were careful in maintaining separate records,  
12 records of services rendered on behalf of the official  
13 Creditors Committee on the one hand and on behalf of their  
14 own individual claimants on the other, and the amounts for  
15 which they sought reimbursement here were for only those  
16 items, those elements of the work done on behalf of the  
17 official Creditors Committee and through the official  
18 Creditors Committee on behalf of the creditors as a whole.

19 The official Creditors Committee's application  
20 for allowances for benefitting creditors as a whole was  
21 denied by your Honor. By a like token, if your Honor please,  
22 I say that the application of the Dunnington firm for ser-  
23 vices rendered for the benefit of only one group of credi-  
24 tors at the expense of another group of creditors should  
25 be denied.

1 sljp

2 THE COURT: Do you desire to offer any oral  
3 testimony?

4 MR. SWORDS: No, your Honor.

5 THE COURT: Mr. Stewart, do you dispute any of  
6 the facts that have been narrated by Mr. Swords?

7 MR. STEWART: I do not dispute the facts that  
8 he has set forth. I do dispute the conclusions drawn from  
9 those facts.

10 THE COURT: Do you desire to present any oral  
11 testimony?

12 MR. STEWART: No, sir.

13 THE COURT: Then, I take it that my only task  
14 is to ask you one more question: Do you desire to submit  
15 a memorandum?

16 MR. SWORDS: No, your Honor. If your Honor  
17 cares for one, I would be glad to, but I think we have set  
18 forth our full argument in the affidavit that we submitted  
19 in opposition.

20 THE COURT: Then you are going to rest on that  
21 with no further memorandum?

22 MR. SWORDS: That is right, your Honor.

23 THE COURT: As to facts or law?

24 MR. SWORDS: That is correct, your Honor.

25 THE COURT: Now Mr. Stewart, do you desire to

1 sljp

2 submit any further memorandum?

3 MR. STEWART: No, your Honor. We have set  
4 forth our position in our application.

5 THE COURT: Do you claim that you are entitled  
6 to be compensated for services prior to your substitution  
7 of Lord, Day & Lord?

8 MR. STEWART: As being counsel for Scarburgh,  
9 your Honor?

10 THE COURT: For any purpose at all. Do you  
11 contend that you rendered any services for the benefit of  
12 the debtor estate prior to your substitution in place of  
13 Lord, Day & Lord?

14 MR. STEWART: Yes, your Honor, we do request  
15 compensation for the time and effort spent both before the  
16 formal substitution and after.

17 THE COURT: What date was the date of the formal  
18 substitution, do you know?

19 MR. STEWART: March 21st.

20 THE COURT: March 21st of what year?

21 MR. STEWART: Of 1974.

22 As a practical matter, we were working on the  
23 question after the formal substitution, and we were per-  
24 haps a little slow in our paper work in getting that  
25 accomplished.

1 sljp

2 THE COURT: You don't desire to submit any  
3 brief on this at all?

4 MR. STEWART: We have set forth our argument  
5 on the law in our papers, your Honor.

6 THE COURT: And that is all you are going to  
7 rest on?

8 MR. STEWART: Yes, sir.

9 THE COURT: All right, I will reserve decision.

10 My offhand impression is that you ~~are~~ not en-  
11 titled to it, but I am not so deciding. My offhand im-  
12 pression is that you are not entitled to any allowance.

13 However, I will read your papers carefully,  
14 and, if aggrieved, you know you have your remedy.

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In the Matter of AMERICAN EXPRESS WAREHOUSING, LTD., Debtor.

Endorsement and Order  
63 B 1021

The firm of Dunnington, Bartholow & Miller, representing the largest creditor, SCARBURGH COMPANY, INC. (SCARBURGH), has moved for an allowance of attorneys fees for services rendered to the creditors in successfully opposing the allowance sought by the Official Creditor Committee (OCC) for their counsel on March 8, 1974, thus conserving to the creditors the sum of approximately \$700,000. Familiarity with my decision denying such an allowance is assumed.

In that prior proceeding, moving attorneys representing SCARBURGH submitted an affidavit and memorandum of law and argued orally to the Court in opposition to the OCC allowance. Surprisingly, the attorney for the Debtor did not oppose the granting of such an allowance and, although various creditors did oppose, SCARBURGH was the only one who did so through counsel acting on behalf of all. As a result, the legal position of SCARBURGH counsel was adopted by the Court, which had originally inclined toward the granting of the allowance. The \$700,000 saved to the Estate by the efforts of SCARBURGH counsel was pro rata to all the creditors. At present there is the additional sum of \$26,532.61 for distribution to all creditors pro rata. Counsel seeks its allowance of \$39,544.00 based on actual time expended, but has agreed to take the balance of \$26,000 in full satisfaction, certainly a nominal amount in view of the benefit conferred on the Estate.

The application for this allowance is opposed by the attorney for the Debtor on the ground that moving counsel was never appointed by the Court to represent the creditors and that there are no special circumstances justifying the award in the absence of such an order. The attorney for the Debtor explains his failure to oppose the OCC's petition for an allowance as a non-combatant in a battle between creditors with merit on both sides. He also argues that the denial of the \$700,000 award to the OCC benefited only the small group of creditors represented by SCARBURGH here rather than the OCC group, so that there has been no benefit to all the creditors as a result of counsel's efforts.

All sides agree that, while an order appointing a group or an attorney to act for the creditors is the usual condition precedent to an award out of the Estate, special circumstances may serve to dispense with this requirement. In Re SAPPHIRE STEAMSHIP LINES, INC.

(C.A. 2nd, Jan. 14, 1975), Docket No. 74-1533. Interestingly enough, this was the case relied on by the OCC as authority for its allowance because the District Court had allowed compensation to attorneys for two large creditors who had been instrumental in bringing the Estate while advancing their own client's interests. In that case, the Trustee and the bankrupt had opposed the allowance and the Referee had sustained their objections, but was overruled by the District Court. The reason advanced by the Referee was the same as that given by me in this matter, that the attorneys had been advancing their own clients' interests, and should look to them for compensation.

The Court of Appeals, in denying the allowance, adhered to the general rule that "the fee of a creditor's attorney is not to be paid from the bankruptcy estate", citing GUERIN v. WELL, GOTSHAL & MANGES, 205 F. 2d 302 (2nd Cir., 1953). The Court set forth the three basic requirements before the rule may be waived (1) the failure or refusal of the Trustee to act, (2) conferral of a tangible benefit on all the creditors, (3) formal authorization by the Court to have the attorney act for the Trustee or "Special Circumstances" permitting the dispensing with such prior authorization. Much to the point here is the example given by the Court for such dispensation, e.g., where objecting counsel has successfully opposed exorbitant fee applications of the Trustee and his counsel, which the Trustee would not oppose. In re New York Investors, 130 F. 2d 90 (C.A. 2, 1942).

I find the first two requirements and the special circumstance are present so as to warrant the allowance to SCARBURGH's counsel. Since the OCC represented the large creditors, it was or should have been the watchdog for all the creditors and the one to oppose such an allowance. However, made up as it was of counsel, it would not oppose its own application to reimburse its clients for legal fees already paid. There was also a failure of the attorney for the Debtor to act like a Trustee, he should have taken a position in opposition to payment of these legal fees to the creditors attorneys, which the Bankruptcy Act clearly prohibits. Second, solehandedly, the efforts of SCARBURGH's present attorneys conferred a tangible benefit on all the creditors since the fee saved has been distributed pro rata to all creditors.\*

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\*This is particularly so here for SCARBURGH's prior counsel had been a prominent member of the OCC, to whom a fee of over \$74,000 was paid by SCARBURGH and to whom an additional \$41,000 is allegedly due it.

J 222<sup>a</sup>

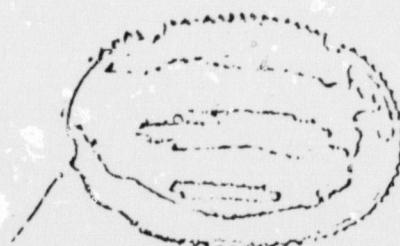
The fact that the OCC creditors may have contributed more to salvaging the Estate's assets than the smaller creditors does not entitle them to reimbursement of their legal fees. They had more at stake than the small creditors and more to lose if they did not participate actively in the proceedings.

As the Second Circuit Court of Appeal said, this is a Court of Equity and the equities here are that, through the efforts of SCARBURGH, all the creditors, most of whom could not afford counsel, have shared in \$700,000 which otherwise would have gone to the large OCC creditors. Finally, the desirability of encouraging opposition to large allowances at the expense of the small creditors cannot be gainsaid. Sartorius v. Bardo, 95 F. 2d 387 (2 Cir., 1938).

The application is granted; so ordered.

Dated: March 26, 1975.

A. J. Scarpelli  
U.S.D.J.



J 223a

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In the Matter : Index No. 63 B 1021  
of : NOTICE OF ENTRY  
AMERICAN EXPRESS WAREHOUSING, LTD., :  
Debtor. :  
-----X

SIRS:

PLEASE TAKE NOTICE that the within order was entered  
by the Honorable Sylvester J. Ryan on March 26, 1975.

Dated: New York, New York  
March 31, 1975

DUNNINGTON, BARTHOLOME & MILLER

By

  
A Member of the Firm

Attorneys for Scarburgh Company,  
Inc.

161 East 42nd Street  
New York, New York 10017  
Tel. No. 212-682-8811

TO: All parties listed  
Exhibit A

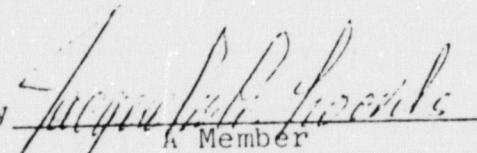
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In the Matter : In Proceedings for  
of : an Arrangement  
AMERICAN EXPRESS WAREHOUSING, LTD., : NO. 63/B-1021  
Debtor. : NOTICE OF APPEAL  
-----X

NOTICE IS HEREBY GIVEN that American Express  
Warehousing, Ltd., debtor above named, hereby appeals to the  
United States Court of Appeals for the Second Circuit from  
the order of the United States District Court for the  
Southern District of New York by Honorable Sylvester J. Ryan,  
entered in this proceeding on March 26, 1975, awarding an  
allowance of attorneys' fees to Dunnington, Bartholow &  
Miller.

Dated: New York, New York  
April 23, 1975

CADWALADER, WICKERSHAM & TAFT

By   
A Member  
Attorneys for American Express  
Warehousing, Ltd., Debtor  
One Wall Street  
New York, New York 10005  
(212) 785-1000

J 225a

TO: Clerk of the Court  
United States District Court  
Southern District of New York

Dunnington, Bartholow & Miller, Esqs.  
individually and attorneys for  
Scarburgh Company  
161 East 42nd Street  
New York, New York 10017

White & Case, Esqs.  
attorneys for Official  
Creditors Committee  
New York, New York 10005



for binding  
copy; all others  
OK

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
In the Matter : 75-500 6  
of : Index No. 75-5006  
AMERICAN EXPRESS WAREHOUSING, LTD., :  
Debtor. :  
-----x

B

JOINT APPENDIX

ERRATA

1. The information found on page J 183a is misplaced. It should appear following the Affidavit in Opposition to Application of Dunnington, et al., for Allowances, pages J 184a-189a, and not the Application for Allowance, pages J 171a-182a.

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